86 No. 1840

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OLIVER H. CLAYPOOL, JR., AND OLIVER H. CLAYPOOL, JR. AS NEXT FRIEND OF OLIVER J. CLAYPOOL, CHRISTINE O. CLAYPOOL, AND ROBERT L. CLAYPOOL, Appellants,

v.

ELIZABETH J. CLAYPOOL, Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

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May 18, 1987

QUESTIONS PRESENTED

(1) Whether sections 20-7-870 and 20-7-880 of the South Carolina Code are violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States when applied to arrest a person for an alleged constructive civil contempt without notice and an opportunity to be heard.

(2) Whether Section 20-7-4000 of the South Carolina Code is violative of the Thirteenth Amendment of the Constitution of the United States when applied to "sentence" a person to forced labor for an alleged civil contempt of court.

(3) Whether 28 U.S.C. 1738A(e) is invalid and therefore the family court was not required to give appellant father reasonable notice and opportunity to be heard before it made a child custody determination adverse to him.

Additional federal questions presented pursuant to Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922):

(4) Whether the orders of the South Carolina courts depriving the appellant children of their father and appellant father of his children without notice and an opportunity to be heard are violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

(5) Whether the law of South Carolina as interpreted by its highest court that females are favored over males as the recipients of judicial awards of custody of children, as applied, deprived the appellant father of his right to due process of law guaranteed him by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

(6) Whether the law of South Carolina as interpreted by its highest court that females are favored over males as the recipients of judicial awards of custody of children, as applied, deprived the appellant father of his right to equal protection of the laws guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

(7) Whether the Full Faith and Credit Clause of the United States Constitution mandates that South Carolina give a Michigan decree dated December 31, 1981, and/or as amended April 1, 1982, no effect on August 14, 1985, to disturb children in an "established custodial environment" with their father, since the public acts, records and judicial proceedings of Michigan reveal that Michigan would give said decree no effect under such circumstances on said date.

(8) Whether South Carolina was precluded by the Full Faith and Credit Clause of the United States Constitution from modifying the Michigan decree.

(9) Whether the law of South Carolina as interpreted by its highest court as applied in this case to deprive the appellant children of their father and the appellant father of custody of his children is so vague and uncertain as to be repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

(10) Whether the family court's order forfeiting the Appearance Bond after the appellant father had appeared in full satisfaction of its terms is contrary to due process of law guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

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Note: The Transcript of Record on Appeal to the Supreme Court of South Carolina is designated herein as "TR" while the appellants' brief on appeal to the South Carolina Supreme Court is desigated herein as "AB".

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OLIVER H. CLAYPOOL, JR., and OLIVER H. CLAYPOOL, JR. AS NEXT FRIEND OF OLIVER J. CLAYPOOL, CHRISTINE O. CLAYPOOL AND ROBERT L. CLAYPOOL, Appellants,

v.

ELIZABETH J. CLAYPOOL, Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

Appellants appeal from such part of the final judgement of the Supreme Court of South Carolina, dated April 6, 1987, which affirmed the denial by the Family

Court of the Fifteenth Judicial Circuit of various petitions and motions made on behalf of the appellants requesting that the custody of appellant children be decreed to be with their father and that prior orders involving custody of the children and the arrest of the father for an alleged constructive civil contempt be vacated, modified or declared invalid and the children returned to their father.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (to the best of the appellants' knowledge) is not reported. It is reprinted in the appendix hereto, p. 1a, infra.

The orders of the Family Court of the Fifteenth Judicial Circuit of South Carolina are not reported. They are reprinted in the appendix hereto: Order of February 27, 1986, p. 6a.

Order of January 14, 1986, p. 17a.

Order of January 8, 1986, p. 32a.

Order of December 12, 1985, p. 39a.

Order of October 28, 1985, p. 43a.

Order of August 14, 1985, p. 57a.

The Orders of the Circuit Court for the County of Oakland, Michigan are not reported. They are reprinted in the appendix hereto:

Order of April 1, 1982, p. 61a.

Order of December 31, 1981, p 64a.

JURISDICTION

The judgement of the Supreme Court of South Carolina explicitly or implicitly holding that South Carolina Code sections 20-7-870 and 20-7-880 as applied in this case to arrest appellant father without notice or opportunity to be heard for an alleged constructive civil contempt of court are valid rather than unconstitutional as violative of the

Due Process Clause of the Fourteenth Amendment of the Constitution of the United States; that section 20-7-4000 of the South Carolina Code is valid rather than unconstitutional as violative of the Thirteenth Amendment of the Constitution of the United States when applied to "sentence" a person to forced labor for an alleged constructive civil contempt of court; that 28 U.S.C. 1738A(e) is invalid and therefore the family court was not required to give appellant father reasonable notice and opportunity to be heard before it made a child custody determination adverse to him; that the orders of the family court depriving the appellant children of their father and the appellant father of his children without notice and an opportunity to be heard are not violative of the appellants' rights not to be deprived of

life, liberty or property without due process of law as guaranteed them by the Due Process Clause of the Fourteenth Amdendment of the Constitution of the United States; that the law of South Carolina as interpreted by its highest court that females are favored over males as the recipients of judicial awards of custody of children, as applied, did not deprive appellant father of his right to due process of law or his right to the equal protection of the law under the Fourteenth Amendment of the Constitution of the United States; that the law of South Carolina as interpreted by its highest court as applied herein to take and keep appellant children away from their appellant father is not so vague as to be repugnant to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States; that

the courts of "South Carolina must give full faith and credit to the decree of another State..." meaning that South Carolina must enforce an obsolete decree per its long out-of-date terms, (but only those terms favoring female appellee and not those favoring appellants) and pursuant thereto order appellant children be taken from an established custodial environment that they had enjoyed with their father for over three and one-half years despite the fact that "the public Acts, Records, and Judicial Proceedings of" Michigan hold that the children in such an established custodial environment are to be protected therein and such prior decrees do not constitute authority for removing children from such an established custodial environment, and, even though circumstances since the decree's issuance had drastically and

materially changed and none of the parties reside in Michigan or have any significant connection therewith, South Carolina must enforce the decree per its original terms without consideration of its modification despite the fact that "the public Acts, Records, and Judicial Proceedings of" Michigan hold that said decrees are modifiable and are not to be enforced under such circumstances as herein but should be modified to reflect the change in circumstances and the best interests of the children, all notwithstanding the Full Faith and Credit Clause of the United States Constitution; and that the family court's forfeiture of appellant father's Appearance Bond despite his appearance in complete satisfaction of its conditions was not contrary to due process of law guaranteed by the Due Process Clause of the

Fourteenth Amendment of the Constitution of the United States, was filed on April 6, 1987. No motions for rehearing were filed.

A Notice of Appeal to this Court was timely filed in the Supreme Court of South Carolina on April 20, 1987. This appeal is being docketed in this Court within 90 days from the judgement of the court below.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2) and 28 U.S.C. 1257(1). The record being properly before this Court on the basis of an appeal of the decision of South Carolina's highest court sustaining the validity of its state statutes against the Constitution of the United States, additional federal questions properly raised below and adversely decided by South Carolina's highest court are

presented herein pursuant to Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).

Jurisdiction is also sustained pursuant to Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); because if review were not authorized, this action would fall within the class of actions that are "capable of repetition, yet evading review" adversely affecting appellant father and appellant children "without a chance of redress." "The judiciary must not close the door to the resolution of the important questions these concrete disputes present." Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 127 (1974).

The decisions below are misleadingly underinclusive in their statements of the facts of the case, on occasion they contradict one another, and they contain material misstatements of the facts that

are totally without foundation, as can be readily verified from the record. "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter's Lessee, 1 Wheat. 304; Cooper v. Aaron, 358 U.S. 1. This principle was well stated in Niemotko v. Maryland, 340 U.S. 268, 271: 'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will rexamine the evidentiary basis on which those conclusions are founded.'" Napue v. Illinois, 360 U.S. 264 (1959); citing numerous additional cases as well.

"It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support. N.A.A.C.P. v. Alabama, 357 U.S. 449, 455 (1958); Staub v. City of Baxley, 355 U.S. 313, 318-320 (1958); Ward v. Love County, 253 U.S. 17, 22." Wolfe v. North Carolina, 364 U.S. 177, 185-186, (1960). States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio 385 U.S. 92 (1966).

Furthermore, the validity of a state statute may be drawn into question without the use of any particular form of words "(a)nd if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been

adequately presented. (fn. 2 citing numerous cases, omitted) Of course the decision must be against the claim of invalidity. But it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgement has been to deny the claim, that is enough. (fn.3 citing numerous cases, omitted.)" Bryant v. Zimmerman, 278 U.S. 63 (1928). Orr v. Orr, 440 U.S. 268 (1979) also sustains jurisdiction.

Finally, in regard to jurisdiction pursuant 28 U.S.C 1257(1), where as here, the facts pertinent to bringing the appellants within the protection and the application of 28 U.S.C 1738(A)(e) are both obvious and undisputed, it necessarily follows that the federal statute must have been held invalid or the resultant decision could not have been made and therefore appellate

jurisdiction here must follow for the state may not evade the statute and appellants' statutory right to appeal is not defeated by the state court's ommission in referring to the statute in its decision. Crowell v. Randell, 10 Pet. 368, (1836); wherein Justice Story makes a very thorough analysis of case after case approving this reasoning.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Full Faith and Credit Clause, Article IV, Section 1, United States Constitution,:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Thirteenth Amendment, United States Constitution, in relevant part:

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to its jurisdiction.

Fourteenth Amendment, United States Constitution, in relevant part:

... nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1738A(e) provides:

Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to

the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

20-7-870 South Carolina Code of Law:

> Where a respondent shall neglect or refuse to obey an order for support or upon agreement signed by the respondent and approved by the court, and the court is satisfied thereof by competent proof, it may with or without notice, issue a warrant to commit the respondent to jail until the order is obeyed or until the respondent is discharged by law.

20-7-880 South Carolina Code of Law, provides in relevant part:

> That when a petition is presented to the court and it shall appear: (1) That the summons or rule to show cause cannot be served; or (2) That the respondent has failed to obey the summons or rule to show cause; or (3) That the respondent is likely to leave the jurisdiction; or (4) That the summons or rule to show cause would be ineffectual; or (5) That the safety of the petitioner is endangered; or (6) That a respondent on bond or on probation has failed to appear, the

court may issue a warrant, ... directing that the respondent be arrested and brought before the court....

20-7-4000 South Carolina Code of Law

Notwithstanding any other provisions of law, any adult sentenced to more than 90 days under the provisions of this chapter may in the discretion of the Family Court Judge serve such time in a minimum security state facility.

Rule 23, Rules of the Supreme Court of South Carolina, in relevant part:

... the Court may file a memorandum opinion dismissing the appeal, affirming or reversing the judgement appealed from, or granting other appropriate relief when, in a unanimous decision, the Court determines that a full written opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgement of the trial court is based on findings of fact which are not clearly erroneous; (2) that the evidence of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; (4) that no error of law appears.

STATEMENT OF THE CASE

Elizabeth J. Claypool and Oliver H. Claypool, Jr., are the parents of Oliver J. Claypool, age 6, Christine O. Claypool, age 9, and Robert L. Claypool, age 10.

Pursuant to the no-fault divorce law of Michigan (and under the circumstances described below which the father contends caused the decree to be invalid ab initio due to the mother's fraud upon the court) the mother appellee herein, procured a judgement of divorce in the Circuit Court for the County of Oakland, Michigan which was filed on December 31, 1981, and ordered that for a period of one year or until further order of the court, each parent held joint legal custody of the children, the mother during the school year to have physical custody 5 days per week and the father to have physical

custody 2 days per week, while during the summer the father was to have physical custody 5 days per week and the mother 2 days per week. During the school year the father was ordered to pay $208.50 per week "child support". Since both parents were employed full time, when the mother had physical custody of the children they were cared for by her live-in babysitter.

In early January, 1982, the mother's live-in babysitter reported, among other things, that the mother had purposely caused herself to be fired from her job and using money supplied by the father for the support of the children had purchased an airline ticket and flown to Florida to be with a married boyfriend leaving the children and her in a house without heat, without funds, without sufficient food, and without a means of transportation. (TR pp. 81-86) Later in

the month, after the mother was back in Michigan, the children's school bus driver reported that Christine who had just turned 4 years old and Bobby who had just turned 5 years old appeared "drugged" in the mornings when they were picked up from their mother's house.

On January 22, 1982, school officials requested that the parents sign authorizations for the children to be medically examined because Bobby suffered "tremors" and Christine suffered from "some tremors and an unsteady gait". (TR pp. 169-170.) While both parents signed the authorizations, the mother stated that she doubted that the school should plan to proceed with its examinations because she expected that the children might not be coming back to the school in the near future.(TR p. 115). At about that time, Christine came to her father suffering from frostbite.(TR p. 275, 312)

On February 5, 1982, the father found that all three children were seriously ill and that his 13 month old son, a baby still too young to talk, had raw sores covering a large portion of his body, was having difficulty breathing and was in very bad health due to obvious neglect, poor diet and lack of care caused by the mother. (TR pp 81-2, p.314).

The father knew that ideally it was best to have an attorney file an appeal or an appropriate petition to change the decree (indeed one had already been selected to do so) but he also knew that he had to act fast and the advice of his attorney that it would be a long procedure was true for he had already found that delay, due to backlogs or other unknown reasons, was apparently unavoidable in such matters for on April 1, 1981, while the court had said that it

would enforce the mother's ex parte order it had also said that it would hold a hearing on the merits within 30 days, and while the father had done everything he could to get that hearing scheduled (and the court had later said that it had not done anything to cause delay) the hearing had not been held until mid December 1981, at which time what was true was thought to be false and what was false was thought to be true and at which time the court had ignored the lengthy Investigative Report of the Friend of the Court which had been favorable to him and had pointed out among other things that "all three children adjusted and did well during the weeks when they lived with (the father) and his parents earlier this year before (the mother) was given temporary custody." (TR 168).

The father knew that in December 1980, the mother had testified that the children were always upset after visiting the father and the court had blamed it on him while the truth was that the children were upset because they were all afraid of their mother and did not want to return to her. The father did not know what caused all of their fears, but he did know that on Sunday after Sunday they had cried and clung to him with all their strength when he had returned them to their mother's house.

The father also knew that in the winters of Michigan people without heat could die from the bitter cold and that under all the circumstances if he were to take such very young children to their mother he could be putting their lives in danger. He also knew that the primary purpose of the decree was to insure that

the children be protected. He intended to carry out that purpose. (TR 315).

The father had heard the mother tell the children on five separate occasions that he had been solely responsible for their having been born, that she had not wanted them and did not want them and that he could have them. (TR p. 312) . Therefore, pursuant to his responsibility and to carry out the primary purpose of the decree the father and the three children left Michigan moved to Ohio, changed their names, afterwards moving to live in Oceanside Village, S. Carolina.

The father's first goal was to turn very unhealthy children into healthy ones and after professional medical assistance and with the Grace of God this goal was accomplished. His next goal was to become so situated that the children would have good, normal and enjoyable

childhoods and with the help of many kind South Carolinians this was quickly accomplished. The children found many wonderful friends in their South Carolina community and were immediately welcomed in the church of their faith and enrolled in religious instruction classes for their age groups. In their father's care, often joined by their friends, they were regulars at their local library, the beach, local parks and playgrounds. That fall Bobby entered first grade and Christine entered kindergarden.

The father found employment with a wonderfully kind employer who allowed him to adjust his hours of work around the needs of the children and through such employment he was able to support the children in comfort. Community events, plays, concerts, and other wholesome cultural activities related to church and

school, all added to the children's lives. After Bobby and Christine had completed 2 years of school with perfect attendance records, Oliver entered kindergarden and all three children were at the top of their classes in a very excellent school. Christine with her friends joined the Brownies and the family became charter members of the Grand Strand YMCA. All three children enrolled in swimming lessons, the older two for horseback riding, all for family nights, canoe classes, and additional swimming lessons through the YMCA and the American Red Cross. In their father's care the children grew and flourished.

And so the children and their father lived very happily in their South Carolina community for about three and one-half years and as set forth in the Statement of the case on appeal, which

having been unobjected to is binding upon the parties: "that during that time the children were in ...(their father's) sole custody and they had looked solely to him for parental guidance, discipline, the necessities of life, and parental love and comfort and that the children in his custody were in an established custodial environment which was protected against change by Michigan law." (TR p. 3.)

On August 14, 1985, the mother obtained an ex parte order from the Family Court of the Fifteenth Judicial Circuit of South Carolina ordering that the sheriff take immediate "possession" of the children (which he did) and further ordering that the father appear on August 16, 1985, to show cause why custody should not change to the mother per a Michigan order dated April 1, 1982, which purportedly found the father in

contempt for leaving Michigan and on that basis ordered custody to be with the mother. The father appeared on August 16, 1985, with documents and five (5) witnesses ready to show through their testimony, his own testimony and the cross-examination of the mother, good and sufficient cause why custody should not change but the family court stated it would not hear it that day; that the mother could have immediate "possession"; that child support was denied; and that a full hearing on the merits would be held within about 30 days with one possible exception, that if the children were back in Michigan, the family court might defer to the Michigan court.

The mother, a resident of Florida, took the children to Florida, and without a hearing on the merits ever having been held, a second South Carolina Family

Court judge filed an Order on October 28, 1985, holding that while the father had satisfactorily alleged a change of circumstances sufficient to modify the prior Michigan decree, South Carolina did not have jurisdiction to hear the matter and further ordering that a Michigan order dated December 31, 1982, be made an order of the South Carolina court with the father to pay child support under said order to the Horry County Clerk of Court in the amount of $208.50 plus 3% service charge per week.

Knowing that the Michigan order presented by the mother was invalid either ab initio due to the mother's fraud or at least presently invalid pursuant to Michigan law regarding change of circumstances and established custodial environments and that under the Due Process Clause of the Fourteenth

Amendment of the United States Constitution and 28 U.S.C.1738(A)(e) he was entitled to a hearing before the State of South Carolina could lawfully take his children from him, knowing that the children having lived in South Carolina for over 3 and 1/2 years meant that under both federal and state law South Carolina did have jurisdiction, and knowing that under South Carolina law found in Ex Parte The State of South Carolina (In Re Brittian), 263 S.C. 363, 210 S.E.2d 600 (1974), and Murphy v. Murphy, 269 S.C. 101, 236 S.E.2d 417 (1977), and others, the second judge had no jurisdiction or authority to overrule the first judge's order that a hearing on the merits would be held and therefore, the second judge's order was invalid, ultra vires, unlawful and of no effect, and learning from the clerk of the

Michigan court that there was no order dated December 31, 1982, in the case, and hence the second judge was attempting to enforce some order that did not exist, the father continued to seek the hearing on the merits ordered by the first judge.

On December 11, 1985, without notice or opportunity for the appellants to be heard the family court (apparently) issued an ex parte order for the father's arrest for alleged constructive civil contempt for his failure to pay child support and despite the father's repeated requests for a hearing prior to his incarceration, he was not allowed a hearing prior to his incarceration.

HOW THE FEDERAL QUESTIONS WERE RAISED

The appellants raised the federal questions involved herein at the earliest opportunity afforded below. Since the

family court's orders depriving appellant children of their father and appellant father of custody of his children and ordering his arrest and incarceration, were issued ex parte without notice or an opportunity to be heard it was only after said orders were issued that there was any opportunity to object to them and raise federal claims.

On December 16, 1985, five (5) days after his arrest, the father was taken from jail to the family court where he voiced his objection to the family court's ex parte orders depriving him of the custody his children and ordering his arrest and incarceration without ever allowing him to be heard and without ever allowing him to present any evidence relating to the children, stating that said orders were unlawful and in violation of the Fourteenth Amendment's

guarantee relating to due process of law and that his incarceration was unlawful and in violation of the Constitution of the United States. (TR pp. 212-221).

The Family Court Judge stated that he understood appellants' objections that the orders were unconstitutional (TR p. 223) and asked whether the father would post a bond to assure his appearance before the court. (TR p. 223-4) The father's response was no. The judge then said he would give him that opportunity pending a hearing to which the father responded that he would not post a bond unless "...the issue at the hearing that would come forward would be the question of the entire matter...." (TR p. 224) and upon that understanding the court set an Appearance Bond of $1,000.00 which was then posted upon the father's behalf.

In a written Order filed January 8, 1986, the family court found that because of the constitutional issues and questions raised by the father a hearing was merited and ordered it to be held on February 7, 1986. It further ordered that the father file and the mother respond to "...any petition for modification of the (previous) order justified by the facts...." Pursuant to said order the father and the children through their attorney filed and served upon the mother a petition and motion for custody of the children alleging, inter alia, that the prior court orders were in error regarding jurisdiction and that the court did have jurisdiction to hear the evidence and should consider the best interests of the children and return them to their father and alternatively that since the order placing the children in

the possession of their mother there had been such a change in their circumstances that they should be placed in the custody of their father. (TR p. 64-66)

While the January 8, 1986, order thus apparently assured a February hearing on the merits of the custody of his children the father on January 14, 1986, (and again on January 20, 1986, because in an "Amended Final Order" dated January 10, 1986, and filed January 14, 1986, the court ordered that a Michigan decree filed December 31, 1981, be made an order of the South Carolina Family Court) served upon the mother and filed in the family court various written motions seeking, inter alia, reconsideration and vacation of the ex parte custody orders on the grounds that he had a right to be heard on the matter before such orders could be validly entered or maintained

and requesting vacation of the alleged ex parte order for his arrest upon the grounds that it appeared that the sections of law cited by the family court had been repealed prior to his arrest but if not or if new sections of law of similar import had been enacted that "...at least to the extent that they purport to authorize the arrest of an individual solely upon the ground of non-payment of child support and without prior hearing they are unconstitutional and invalid." (TR p. 78, and p. 154.)

On February 7, 1986 the father and some twenty witnesses (some from as far away as Ohio and Michigan) appeared ready to testify and offer admissible documents to show why custody should not change from him to the mother and also to show that the change in the children's circumstances since being with the mother

warranted that in their best interests they be in the custody of their father. (TR pp 165-197 and pp. 230-335). The mother who had been given notice and had answered and counterclaimed on the merits, appeared through her counsel.

But again the long promised hearing on the merits was never held for the family court again reversed itself and refused to hear the matter on the merits. It refused to accept any evidence or testimony whatsoever relating to the children. It also refused to hear the offered testimony of the mother's agent, her live-in babysitter, the father's testimony, as well as a corroborative Report by the Investigator from the Michigan Friend of the Court (TR p. 165-168) offered to show that that the Michigan order was invalid ab initio since it had been procured by the

mother's practice of a fraud upon the Michigan court; that by her false testimony and by her threat and intimidation of witnesses causing their truthful testimony to be unavailable she had caused the Michigan court to have a materially misleading picture of the circumstances and best interests of the children thereby causing it to mistakenly rule in her favor and against the children and the father. (TR p. 276, p. 284, p. 166-168, p. 312, p. 320)

In its written Order filed February 27, 1986, the family court held that "South Carolina must give full faith and credit to the decree of another state absent fraud or lack of jurisdiction." In this decision the family court stated that the father "was served with a Rule to Show Cause under Family Court Rule 53. He failed to appear and a Bench Warrant

was issued under 20-7-870 and 20-7-880." (That the family court knew the facts were contrary to what it was setting forth in its decision is clear from the Court's own words found at lines 6 through 11 of page 212 of the Transcript of Record on appeal below where the judge states "I believe that he was picked up pursuant to a Bench Warrant issued by the records of this Court, based on the Clerk's records, which reflect that he was behind and also based on the fact that the Rule to Show Cause was issued and law enforcement informed the court they were unable to locate him for service.") And interestingly enough, when it was time to arrest the father, law enforcement officals were able to locate him within minutes right where he was known to be, at his regular place of employment and where in connection with

this case law enforcement officials had always readily found him minutes after the issuance of such ex parte orders.

The family court in this decision stated for the first time that it found the father to be in (civil) contempt of court and was ordering him committed to the South Carolina Department of Corrections pursuant to the heretofore unmentioned section 20-7-4000 of the South Carolina Code. Despite the fact that the father had appeared on February 7, 1986, in full compliance with the conditions of the Appearance Bond, the family court ordered it to be forfeited.

Appeal was properly taken to the South Carolina Supreme Court where appellants reiterated their federal claims that pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution they were entitled to notice

and an opportunity to be heard before the family court could deprive the children of their father or the father of the custody of his children or the father of his liberty for an alleged constructive civil contempt.

Through proper exceptions the validity of sections 20-7-870 and 20-7-880 was again put into question on the grounds that said sections as applied unconstitutionally authorize arrests for alleged constructive civil contempt without notice and opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. In their brief on appeal the appellants argued that "(b)oth of these statutes are unconstitutional on their face and in any arguable application...." (AB p.58) and pointed out that even in the Opinions of

the Attorney General of the State of South Carolina, Opinion No. 83-93, p. 156, at 159, (1983) it is stated: "Committment to jail for constructive contempt, such as the violation of a court order, without prior notice and a right to be heard may violate as well the due process clause of the Fourteenth Amendment. (fn.4 ommitted) Petition of Green, 369 U.S. 689 (1962)." (AB p. 58) And after providing the pertinent part of the Fourteenth Amendment and citations to Mullane v. Central Hanover Tr. Co., 339 U.S. 306, at 313; Armstrong v. Manzo, 380 U.S. 545, at 550; Fuentes v. Shevin, 407 U.S. 67, at 80, (1971); and more, the appellants stated: "And thus any and all statutes authorizing summary arrest and incarceration of a person solely because he has failed to pay a court ordered amount of child support and without prior

hearing as to the reason for nonpayment are unconstitutional and void. Yoder v. County of Cumberland, 278 A.2d 379, 389 (Me. 1971)." (AB pp. 59-61). Additional arguments going to the validity of the statutes based on their unconstitutional vagueness were also properly and fully set forth. (AB pp. 62-65).

Proper exceptions were also taken concerning the lower court's "sentencing" of the father to "the South Carolina Department of Corrections for a period of 150 days pursuant to section 20-7-4000 (South Carolina Code)" which among other things when taken as a whole clearly raised the question of the constitutional validity of 20-7-4000, as applied, to force the father into a condition of slavery or involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

A proper exception was also taken to the lower court's implicit finding of the invalidity of 28 U.S.C 1738A(e).

Proper exceptions were taken to the law of South Carolina, as interpreted by its highest court, (eg. Wolfe v. Wolfe, 220 S.C. 437, 68 S.E.2d 348 (1951)) that females are favored over males in the awarding of custody of children, deprived the male appellant father of his right to due process of law and his right to the equal protection of the law in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

Proper exceptions were taken to the lower court's error in holding that it must give full faith and credit to the decree of another state when it meant by that holding that it could not modify the Michigan order and although the lower

court did not cite any authority for such a determination the appellants made clear in their brief on appeal that "The courts of South Carolina are not precluded by the Full Faith and Credit Clause of the United States Constitution or on any other basis from considering the best interests of the children and entering a decree accordingly." (A.B. p. 68.) and that the holding of Ford v. Ford, 371 U.S. 187, 194, (1962) was directly applicable. (A.B. p. 69.).

A proper exception was taken that the forfeiture of the father's Appearance Bond after he had appeared in full satisfaction of its terms was violative of his right to due process of law guaranteed him by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The appellant children, through their father, properly excepted that the lower court had committed error when it deprived them of their father in violation to their right not to be deprived of life, liberty or property without due process of law guaranteed them by the Fourteenth Amendment of the Constitution of the United States.

Appellants properly argued all of their federal claims in their brief on appeal and otherwise complied with all of the Rules of the Supreme Court of South Carolina for the proper presentation of their claims, including petitioning for permission to argue against the South Carolina precedents holding that females are favored over males in the judicial awarding of custody.

The South Carolina Supreme Court raised no procedural objections to

appellants' appeal (and in a portion of its decision not appealed from, it correctly found that the father was not in contempt) but it affirmed the family court's refusal to return the Appearance Bond, it affirmed denial of the motions to vacate the ex parte arrest order, it affirmed the denial of all of the appellants' petitions and motions for custody, and it denied all of the appellants' exceptions containing their federal claims on the merits holding that they "...are without merit and are disposed of under (South Carolina) Supreme Court Rule 23." See Opinion below, p. 4a-5a, infra.

Thus the South Carolina Supreme Court considered and expressly rejected, all of the appellants' federal claims. The result is, that after being incarcerated for 155 days, almost all of which were at

forced labor, the appellant father is still either literally or constructively under arrest; (Hensley v. Municipal Court, 411 U.S. 345 (1973)); the Appearance Bond posted in his behalf has not been returned; the court orders regarding custody are still not vacated and the appellant children, to their great detriment and against their will, are still "in possession" of the appellee mother; the courts of South Carolina will continue to operate in a prejudicial, unfair, and unconstitutional manner (often, as in the instant case, without ever explicitly saying so, See, Stutz v. Funderburk, 272 S.C. 273, 252 S.E.2d 32 (1979)) by favoring the award of custody of children to females over males causing injury to all; the orders and state statutes purportedly authorizing the father's arrest as

specified above are still violative of the federal constitution and still injurious to appellants and others and all of the properly raised federal issues including those involving the invalidity of statutes violative of the Thirteenth Amendment and Fourteenth Amendments of the United States Constitution remain "capable of repetition, yet evading review" unless and until this Court acts upon this appeal.

On April 20, 1987, appellants filed in the South Carolina Supreme Court a notice of appeal to this Court and properly served copies upon the mother's counsel, the mother, the Attorney General of the State of South Carolina attention of the Asst. Attorney General previously apprised of the matter, as well as the Clerk of the Family Court. 28 U.S.C 2403(b) may be applicable.

THE QUESTIONS ARE SUBSTANTIAL

The constitutional questions presented in this case are substantial because they involve the fundamental principles upon which all of our American jurisprudence is based, the principles of freedom, fairness, and justice that find form in the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. Additionally, the questions are presented in the context of a case involving the rights of parents to the custody of their children an issue of the utmost importance to the future of the parties involved and to the future of our entire American society as well.

That the questions herein are so substantial as to require plenary consideration with briefs on the merits and oral argument is made obvious by the

fact that this Court is presently considering at least two cases dealing with closely related questions in the child custody and child support-contempt context. In the first case, Hicks v. Feiock, No. A-288, 479 U.S. ___, 93 L.Ed.2d 237 (1986) the question is whether a finding of contempt of a father for failure to pay child support violates the due process clause of the Fourteenth Amendment absent proof of ability to pay. And while the opinion of O'Connor, J. as Circuit Justice in granting a stay indicates that the initial impulse is toward reversing the refreshingly liberty oriented state decision hopefully further reflection will result in this Court's sustaining of the California courts decision. In any event, it is certainly clear that if this Court will resolve the questions presented herein the underlying

problem in Hicks v. Feiock is far less likely to ever occur.

In the second case, Thompson v. Thompson, No. 86-964; certiorari granted January 27, 1987, the question of whether parents involved in a child custody contest may assert rights under 28 U.S.C. 1738A in a U. S. District Court is the obverse side of one of the questions raised in this case: whether a parent involved in a child custody contest will be protected by 28 U.S.C. 1738A(e) when the facts undisputedly show such protection is due or may the state court implicitly hold that 28 U.S.C. 1738(A)(e) is an invalid legislative act and hence not affording protection even to those undisputedly within its its terms. Accordingly, the question herein is seen to be both substantial and timely.

That the resolution of the questions presented herein is of major importance to the entire country is also revealed by the Congressional Findings and Declarations of Purposes for Parental Kidnapping Prevention Act of 1980. Section 7 of Pub.L. 96-611 states:

> (a) The Congress finds that--
> (1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories of the United States;
>
> (2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;
>
> (3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to seizure,

> restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting court orders by the courts of various jurisdictions, and interstate travel and communications that is so expensive and time consuming as to disrupt their occupations and commercial activities; and
>
> (4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of other jurisdictions, the deprivations of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions, and with foreign nations, and the harm to the welfare of children and their parents and other custodians.

That after making the above findings the Congressional legislative solution that followed amounts only to about as much of a solution to the stated problem as the runaway slave laws were a solution to the problem of slavery, only further reveals the substantiality of the questions presented herein while at the same time clearly illuminating the

responsibility of this Court as the final and supreme arbiter of the law of the land to solve a national problem by means readily at hand by simply emphatically holding that the Constitution of the United States should be applied and followed in all child custody cases.

To state that appellants and the Constitution of the United States were shockingly abused in the instant case is to put it far too mildly. To recognize that this case is distinguishable from many thousands of others like it across the country only by the fact that it has reached this Court, is to understand that as found by the Congress, it is the regular failure of so many of the courts of this country to afford children and parents their federal constitutional rights in child custody cases that is the direct and proximate cause of the tragic

situation of so many of thousands of the children of divorce in this country. Accordingly, an assertion that it is the states and not the federal government that have the expertise in domestic relations is obviously not an appropriate response, for both history and the Congress have already found that the states do not have such expertise. The simple and only just solution to the problem is for this Court to require that the United States Constitution be applied and upheld in all child custody cases.

This Court has consistently found that the interest of parents in the custody and control of their children is one of the highest and most important rights recognized. "The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed

'essential,' Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and (r)ights far more precious ... than property rights.' May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965)

(Goldberg, J. concurring)." Stanley v. Illinois, 405 U.S. 645, 651 (1972).

While it is the lives of three wonderful children and their father (of whom, the mother's counsel below stated: "He submitted tons of Affidavits from neighbors who think he's a wonderful guy." T.R. 225.) that are immediately at stake in this case, from all of the above it is clear that a very substantial portion, if not a majority, of the children and parents of this country have an interest in the correct resolution of the federal questions found herein. The importance of their proper resolution is indicated by this Court's holding in May v. Anderson, 345 U.S. 528 (1953), where it was stated, "But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior

adjudication reflecting another State's discharge of that responsibility at another time." J. Frankfurter, concurring opinion, 345 U.S. at 536.

The holding of the Supreme Court of South Carolina that notice and an opportunity to be heard is not required prior to arrest for an alleged constructive civil contempt is in conflict with at least the following holdings of this Court: In Re Oliver, 333 U.S. 257 (1948); In Re Green, 369 U.S. 689 (1962); Mullane v. Central Hanover Tr. Co., 339 U.S. 306; Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). It is also in conflict with the following cases: Yoder v. County of Cumberland, 278 A.2d 379, 386 (Me. 1971) and Commonwealth ex rel Brown v. Hendrick, 283 A.2d 722 (Pa. Super. 1971) and Ex Parte Harwell, 538 S.W.2d 667 (Tx. App. 1976).

Proof of the substantiality of appellant's question concerning the Thirteenth Amendment is that a long and bitter Civil War was fought over the same basic question for there is no essential difference between the 19th Century question of whether a person may be forced into slavery because of their race and the 20th Century question of whether a person may be forced into slavery because of their sex. The question has not lost its substantiality with the passage of time. If the Civil War ended slavery on the basis of race, there is no reason to reinstitute it now on the basis of sex. The Supreme Court of South Carolina's holding that the Thirteenth Amendment was not violated in this case is in conflict with the holdings in Flannagan v. Jepson, 177 Iowa 393, 158 N.W. 641 (1916); Ex parte Todd, 119 Cal.

57, 50 P. 1071 (1897). See also, In Re Jennings, 133 Cal. App.3d 373, 184 Cal. Rptr. 53 (Ct.App.5th 1982).

The holding of the South Carolina Supreme Court that notice and an opportunity to be heard are not required before the state could deprive the appellant children of their father and the appellant father of the custody of his children is in conflict with this Court's holdings in: Stanley v. Illinois, 405 U.S. 645 (1972); Armstrong v. Manzo, 380 U.S. 545 (1965); Santosky v. Kramer, 455 U.S. 745 (1982);

The holdings of the South Carolina Supreme Court that females are to be favored over males when the courts award the custody of children is in conflict with this Court's holdings in: Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Stanton v.

Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). It is also in conflict with at least the following: Ex Parte Devine, 398 So.2d 686, (Ala. 1981); In Re Marriage of Carney, 24 Cal.3d 725, 157 Cal.Rptr 383, 598 P.2d 36 (1979); McAndrew v. McAndrew, 39 Md.App. 1, 382 A.2d 1081 (1978); Markegard v. Markegard, 37 St. Rep. 1539, 616 P.2d 323 (Mont. 1980); Fleharty v. Fleharty, 202 Neb. 245, 274 N.W.2d 871 (1979); State Ex Rel. Watts v. Watts, 350 N.Y.S.2d 285 (Fm.Ct. 1973); Martin v. Martin, 306 N.W.2d 648 (S.D. 1981); Murray v. Murray, 28 Wash. App. 187, 622 P.2d 1288 (Wash. 1981) And in a situation not unique to South Carolina, (See, A. Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. Family Law 423, (Courts Ignore the Statutes to Favor the Mother),

432 (1977)), the holding of the Supreme Court of South Carolina in this regard is also in direct conflict with South Carolina Code Section 21-21-10.

No interest of the state of South Carolina was found to be at stake by the Supreme Court of South Carolina as it summarily denied the appellants' constitutional claims. Not a single shred of evidence has ever been introduced anywhere but showed that the father is a good father to his children, that the children flourished in his care, that it was in their best interests to be in his care, and that all were being good and responsible citizens of the state of South Carolina. Why, then, should the appellant father not be protected in his natural and constitutional rights to the care and custody of his children? Why should the appellant children not be

protected in their natural and constitutional rights to be with their father? Why should the children be punished by the state of South Carolina when they have done nothing wrong? The absence of any discernable interest of the state in punishing innocent children only adds substantiality to the constitutional questions herein.

Because the rights involved are so fundamental, their loss in the circumstances of this case so grevious, and their loss by others in similar circumstances across the country so prevalent, the fair resolution of the federal constitutional questions presented herein is crucial to the future of this country and therefore the appellants urge that they be given plenary consideration with briefs on the merits and oral argument allowed for their resolution.

CONCLUSION

For the above stated reasons, this Court should note probable jurisdiction of this appeal.

Respectfullly submitted,

Oliver H. Claypool, Jr.
as next friend of Oliver J. Claypool, Christine O. Claypool and Robert L. Claypool, and

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Oliver H. Claypool, Jr.
P. O. Box 15085
Quinby, SC 29501
(803) 669-6201

May 18, 1987.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OLIVER H. CLAYPOOL, JR., AND OLIVER H. CLAYPOOL, JR., AS NEXT FRIEND OF OLIVER J. CLAYPOOL, CHRISTINE O. CLAYPOOL, AND ROBERT L. CLAYPOOL, Appellants,

v.

ELIZABETH J. CLAYPOOL, Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

APPENDIX TO JURISDICTIONAL STATEMENT

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THE STATE OF SOUTH CAROLINA

In the Supreme Court

Elizabeth J. Claypool, Respondent

v.

Oliver Claypool, Jr., Appellant.

Appeal From Horry County

David H. Maring, Family Court Judge

Memorandum Opinion No. 87-MO-175

Heard February 10, 1987 - Filed April 6, 1987

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

PER CURIAM: Appellant (father) appeals from an order of the family court holding him in contempt, applying his appearance bond to child support arrearages and denying his petition and motions for a change of custody, a reduction of child support, and the vacation of a previous family court

order. We reverse those portions of the order holding the father in contempt and refusing to reduce his child support obligation and affirm the remainder.

The parties were divorced in the State of Michigan in 1981. Father had an income at that time of approximately $50,000.00 per year. He was ordered to make weekly child support payments of $208.50. Father is presently employed at a job which pays him approximately seven ($7.00) dollars per hour.

Father was brought before the family court pursuant to S.C. Code Ann. sections 20-7-870 and -880 (1985). The amount of child support arrearages as of the date of the hearing were $2919.00. He was found to be in contempt of court for failure to pay child support.

On appeal from an order of the family court, this Court may find facts in

accordance with its own view of the preponderance of the evidence. Clinkscales v. Clinkscales, 275 S.C. 308, 270 S.E.2d 715 (1980).

A person is in contempt of court when he willfully disobeys a court order. Curlee v. Howe, 277 S.C. 377, 287 S.E.2d 915 (1982). The burden of establishing that there has been contemptous conduct is on the moving party who must show the existance of the order and the facts establishing that it has not been complied with. Brasington v. Shannon, 288 S.C. 183, 341 S.E.2d 130 (1986); Means v. Means, 277 S.C. 428, 288 S.E.2d 811 (1982). Once the contemptous conduct has been established, the burden shifts to the other party to establish his defense and inability to comply with the order. Brasington v. Shannon, supra; Means v. Means, supra; Pratt v. South

Carolina Department of Social Services, 283 S.C. 550, 324 S.E.2d 97 (Ct.App. 1984).

In our opinion, father established that he is presently unable to meet his child support obligation. Therefore, the family court judge erred in finding him to be in contempt of court.

Family Courts have continuing jurisdiction to modify child support upon a proper showing of a change in the supporting parent's ability to pay. Mosley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983); S.C. Code Ann. section 20-3-160 (1985). In our opinion, the family court judge erred in refusing to modify father's child support payment obligations.

Father's exceptions to the remainder of the family court order are without merit and are disposed of under Supreme

Court Rule 23. Accordingly, we reverse the portion of the family court order holding father in contempt, remand for a hearing to determine an appropriate amount of child support and affirm the remainder of the order.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

NESS, C.J., GREGORY, FINNEY, JJ., and Acting Associate Justice Bruce Littlejohn, concur. Associate Justice A. Lee Chandler, not participating.

STATE OF SOUTH CAROLINA COUNTY OF HORRY

IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT FILE NO. 85-DR-26-1552

ORDER FILED FEBRUARY 27, 1986

Elizabeth J. Claypool,

Petitioner,

v.

Oliver Claypool, Jr.
a/k/a Bobby Rogers

Respondent,

IN RE: Christine Claypool (a/k/a Sandy Rogers), Robert Lee Claypool (a/k/a Bobby Rogers), and Oliver James Claypool (a/k/a/ Jack Rogers).

The issues before the court are contempt; disposition of a $1,000.00 cash bond; change of custody; reduction of child support; vacating an Order dated October 28, 1985, pursuant to Circuit Court Rule 60, 43(1), and 15-27-130; and granting extension of Motion to

reconsider the prior Decree nunc pro tunc pursuant to Family Court Rule 3.8

I conclude that the respondent, Oliver Claypool, Jr., a/k/a Bobby Rogers, is in contempt of court and that his request for change of custody, reduction of child support, and other Motions should be denied. I further conclude that the $1,000.00 cash bond should be applied to his child support.

This matter came before the court on a Bench Warrant issued pursuant to 20-7-870 and 20-7-880 for failure of respondent to pay support as ordered. In response, the respondent filed pleadings requesting a change of custody or reduction of child support. He has also filed Motions requesting the court to vacate an Order of this court dated October 28, 1985.

The Petitioner appeared through her attorney. The respondent was represented

by Honorable J. M. Long, Jr. from the date the Bench Warrant was issued. However, at the time the case was called for trial, Mr. Long was sick with the flu. The respondent, who is an attorney, informed the court that he wished to represent himself and that he wanted to proceed with the hearing.

FINDINGS OF FACT

1) This matter is a child kidnapping case. The petitioner was granted custody by the State of Michigan. The respondent never appealed the Michigan Order. The respondent kidnapped the children and fled the State. He eventually settled in Horry County. He changed his name, social security number, and the names of his children.

2) When the petitioner located the respondent, she obtained an Order of the court giving the Horry County Department

of Social Services temporary custody until the matter could be brought before the court for an emergency hearing. The court, at the emergency hearing, granted the mother immediate possession of the children.

3) The matter was scheduled for a hearing after the pleadings were joined before Judge Wilburn. The trial court issued its Order giving the Michigan Decree full faith and credit and directing the respondent to pay $214.70 per week child support to the Office of the Clerk of Court for Horry County. This Order was not appealed.

4) The respondent failed to make his support payments and was served with a Rule to Show Cause under Family Court Rule 53. He failed to appear and a Bench Warrant was issued under 20-7-870 and 20-7-880. He was brought before the court

pursuant to said warrant and was released upon posting a $1000.00 cash bond as assurance for his appearance at the contempt hearing. The money was immediately posted without any difficulty by the respondent.

5) The amount of the respondent's arrearages as of February 7, 1986, were $2919.00.

6) The respondent filed numerous pleadings and Motions with the court as set forth above. At the time of trial, the court denied the respondent's Motions and Petition. However, the court allowed him to proffer in a narrative form the testimony he would offer if he were allowed to testify on the request for change in custody and vacating or reconsidering the Decree of the court.

7) The court did allow him to testify on the issue of contempt and the issue of

reduction in child support. The testimony reflects that he gave up a job paying $50,000.00 per year without any good reason; that he obtained a job making approximately $7.00 per hour in Horry County; that as far as he knew, he was still licensed to practice law; and that he would not pay support for his children even if it were only $100.00 per month.

CONCLUSIONS OF LAW

1) The Family Court has authority to issue a Bench Warrant for the arrest of the respondent under 20-7-870 and 20-7-880.

2) Appeals must be filed within ten (10) days from the service of the Order upon the litigants,

3) Support Orders are not stayed during the pendency of an appeal.

4) South Carolina must give full faith and credit to the Decree of another State absent fraud or lack of jurisdiction.

5) The signing of an Amended Decree to correct scrivner's error does not extend the time for appeal.

6) Orders not appealed from become the law of the case and are binding upon the litigants.

7) The court has authority to place the respondent in jail for contempt for failure to make support payments for a period of one year or a fine of $1,500.00 or both.

8) The court has authority to commit a contemptor to the Department of Corrections under S.C. Code Section 20-7-4000.

9) The court has the authority to require the respondent to post bond as

assurance that child support payments will be made on time as Ordered.

10) The court has the authority to require the respondent to post bond as assurance that he will appear in Court on the date of trial.

11) The court does not have to allow testimony when it is a matter of law that the respondent is not entitled to the relief requested.

12. A respondent has a right to represent himself on a civil procedure as well as a criminal procedure.

Based upon the above findings of facts and conclusions of law, it is

ORDERED that the respondent's Petition and Motions for change of custody, reduction of child support, vacating previous Orders of the Court under Rule 60, 43(10), 3.8, and 15-27-130 be, and the same are hereby denied. It is further

ORDERED that the respondent be, and he is hereby held in contempt of court for failure to pay support as Ordered. It is further

ORDERED that the amount of the respondent's arrearages as of the date of the hearing were $2919.00. It is further

ORDERED that the $1000.00 cash bond posted with the Clerk of Court be, and the same shall be applied to the arrearages. It is further

ORDERED that the respondent shall be committed to the S.C. Department of Corrections for a period of 150 days pursuant to Section 20-7-4000. Provided, however, he may purge himself of contempt as be released upon complying with the following terms:

a) Pay to the Clerk of Court for Horry County the sum of $1919.00 representing the balance of the arrearages as of

February 7, 1986, after giving the respondent credit for the $1,000.00 cash bond which was forfeited.

b) By the payment of $1500.00 fine to the Clerk of Court for Horry County.

c) By the posting of a $2500.00 cash bond with the Clerk of Court for Horry County as assurance that all future payments will be made on time. Provided, however, that if the payments are not made as Ordered, the bond will be forfeited in a manner deemed just and proper by the court. It is further

ORDERED that the Sherriff of Horry County or any other lawful police office shall immediately take the respondent into custody and transport him to the S.C. Department of Corrections for the service of the above sentence. AND IT IS SO ORDERED.

I certify that I verily believe this

Order is in compliance with the requirements of Rule 27(C) of the Rules of Practice for the Family Courts.

DAVID M. MARING, SR. Judge
of the Family Court of the Fifteenth
Judicial Circuit
Conway, South Carolina
Dated February 27, 1986

STATE OF SOUTH CAROLINA COUNTY OF HORRY

IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT FILE NO. 85-DR-26-1552

AMENDED FINAL ORDER FILED JANUARY 14, 1986

Elizabeth J. Claypool,

Petitioner,

v.

Oliver Claypool, Jr.,
a.k.a Bobby Rogers,

Respondent,

IN RE: Christine Claypool (a.k.a. Sandy Rogers), Robert Lee Claypool (a.k.a. Bobby Rogers), and Oliver James Claypool (a.k.a. Jack Rogers)

This matter came before me pursuant to Family Court Administrative Order, Contested Roster No. 46, wherein the above-captioned case was scheduled for a pre-trial hearing and Petitioner's Motion on said date. Present at the hearing

were the Petitioner's attorney, Patricia M. Ferguson, Esquire of Neighborhood Legal Assistance Program, Inc., Conway, South Carolina and the Respondent's attorney, G. Michael Smith, Myrtle Beach, South Carolina. The Petitioner's attorney submitted to this court a Motion and Notice of Motion regarding the issues of dismissing the Answer and Counterclaim of the Respondent, declining jurisdiction of the Counterclaim, and declaring the Respondent in default pursuant to Rule 7 of the Family Court Rules.

FINDINGS OF FACT

Based upon the pleadings, affidavits of the parties, and arguments of counsel, I make the following findings of fact. This action was commenced by the filing of a Temporary Restraining Order and Rule to Show Cause, Summons and Complaint on August 14, 1985. The action arose as a

result of the Respondent moving his children from the jurisdiction of the State of Michigan, changing the children's identities and relocating in Horry County, South Carolina. Through the efforts of law enforcement agencies in Horry County, the Petitioner was notified by said agencies that they had located the children of the parties in Horry County. Upon receiving notification, the Petitioner filed this action wherein she prays that this court enforce the Michigan Custody Decree which had originally granted her primary custody of the parties' minor children; punish the Respondent under the contempt powers of the court; detain the respondent for prosecution by the State of Michigan; award Petitioner all costs and expenses necessary for the enforcement of the Michigan Custody

Decree; and temporary and permanent child support.

On August 16, 1985, the Petitioner together with her attorney and the Respondent together with his attorney appeared before the Honorable David H. Maring. At that hearing, Judge Maring Ordered enforcement of the Michigan Custody Decree and gave possession of the children to the Petitioner, relieved the Horry County Department of Social Services of temporary custody of said children and awarded the Petitioner temporary travel expenses in the amount of $300.00 to be paid by the Respondent pursuant to S.C. Code Ann. section 20-7-812 (1976), as amended. Judge Maring further ordered that further costs and the other issues raised in the Petitioner's Petition be determined at a final hearing on the merits of the

matter. I concur with Judge Maring and find that all terms and conditions of the Michigan Orders dated December 31, 1981 and April 1, 1982 relative to child custody and support are in full force and effect in Horry County, South Carolina.

On September 24, 1985, the Petitioner moved that this court hold Respondent in default pursuant to Rule 7 of the Family Court Rules. After argument of Respondent's counsel together with an Affidavit submitted by him on Respondent's behalf, I find that the Respondent is not in default and allowed the Respondent to answer.

The Petitioner further moved that this court dismiss the Answer and Counterclaim on the grounds that the Counterclaim failed to state facts sufficient to constitute a cause of action and that no specific change of

circumstances were pled. Upon reviewing the Answer and Counterclaim of the Respondent, I find that the allegations contained therein are sufficient to support the cause of action of the Respondent to modify the prior orders of the Michigan Courts.

The Petitioner also prayed for attorneys fees, additional costs, and detainment of the Respondent for prosecution by the State of Michigan. After reviewing the Financial Declarations of the parties and considering the argument of counsel on these ancillary matters and the fact that Petitioner's counsel is paid by federal funds, I find that the Petitioner is not entitled to attorney's fees and due to the fact that Petitioner submitted no evidence of other costs she is not entitled at this time to additional

costs. I further find that this court does not have a factual basis for detaining the Respondent.

The final issue raised by the Petitioner involves the jurisdiction of this Court to hear the matters before it by virtue of the Respondent's Answer and Counterclaim. The Petitioner argued that this court should decline jurisdiction of the Counterclaim pursuant to S.C. Code Ann. sections 20-7-788, 20-7-796, 20-7-810 (1976) as amended. The Respondent argued that this court did in fact have jurisdiction pursuant to S.C. Code Ann. section 20-7-788(a)(1), (2), (4) and S.C. Code Ann. section 20-3-160 (1976) as amended. Based upon the facts argued by counsel, together with the legal precedents set forth below, I find this court does not have jurisdiction to hear this matter.

In addition, this court will not allow a contemptous Respondent to litigate a modification of the Michigan custody decree in the Courts of South Carolina.

CONCLUSIONS OF LAW

The critical legal issue in this matter is whether or not this court has jurisdiction to hear the Counterclaim raised in the Respondent's Answer. Both counsel skillfully presented their positions in this matter and the attorneys aggressively sought rulings in their favor. After hearing arguments of Petitioner's counsel, this court questioned the Respondent's attorney at length regarding his position on the jurisdiction issue. In support of the Respondent's position, the Respondent's attorney submitted a pre-trial brief.

The basis of the Respondent's arguments were that the Respondent removed his children from the jurisdiction of the Michigan Courts and away from the presence of the Petitioner because he felt that it was in the childrens' (sic) best interest and welfare to do so. The Respondent argued that our legislature and our Supreme Court on numerous occasions stood for the premise that the welfare of the children and what is for their best interests is primary, paramount and controlling when the trial court is considering controversies between parents over custody of their minor children. See Powell vs. Powell, 256 S.C. 111, 181 S.E.2d 13 (1971) and S.C. Code Ann. section 20-3-160, as amended.

Relying upon the position that it would be in the children's best interest

for them to relocate and remain with the Respondent, the Respondent's attorney also argued that a substantial change in circumstances had occurred which would necessitate this court reviewing all the facts and circumstances which arose subsequent to the Michigan Decree which had initially awarded the parties their respective custody rights with the children. Further, Respondent's attorney argued that the doctrine of res judicata did not apply in this particular matter because of the fact that the change of circumstances arose subsequent to the execution of the Michigan Orders. See Barrett vs. Barrett, 261 S.C. 11, 198 S.E.2d 532 (1973).

The statutory basis of the Respondent's argument that this court has jurisdiction is S.C. Code Ann. section 20-7-788 (1976), as amended, which states:

(a) a Court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This State: (i) is the home state of the child at the time of the commencement of the proceeding ... and

(2) It is in the best interest of the child that a court of this state assume jurisdiction because: (i) the child and his parents, or the child and at least one contestant, has a significant connection with this state...

I conclude that this court does not have jurisdiction by virtue of S.C. Code Ann. section 20-7-798 (1976) as amended. Subsection B of the above referenced section states:

Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the Petitioner, without consent of the person entitled to custody has not properly removed the child from the physical custody or has improperly retained the child after a visit or other temporary relinguishment of physical custody.

In connection with the aforementioned section, I conclude that the Respondent

(Petitioner on the Counterclaim) improperly removed the children from the jurisdiction of the State of Michigan and wrongfully detained the children and wrongfully concealed the children's identities and whereabouts from their mother. As a result thereof, I conclude that the Court shall not exercise its jurisdiction to modify the prior custody decrees.

Based upon the findings of facts and discussion of law in this matter, I conclude that this court does not have jurisdiction to hear the evidence regarding a change of circumstances which would justify a modification of the Michigan decrees. Therefore, it is ORDERED that the Counterclaim of the Respondent seeking a modification of the Michigan Decrees is dismissed with prejudice; and it is FURTHER ORDERED that

the Petitioner is not entitled to attorney's fees in this cause and the Petitioner is further not entitled to any additional suit costs or other travel expenses at this time; and it is FURTHER ORDERED that the terms and conditions set forth in the Michigan decree filed December 31, 1981, Civil Action No. 81-217811 DM involving the issues of child support and child custody be made an Order of this court and the Respondent is hereby ordered to commence child support payments under said Order with payments to the Horry County Clerk of Court. The first payment shall be made within 10 days from the date of this Order, in the amount of $69.50 per child per week for a payment of $208.50 plus 3% court costs, for a total payment of $214.70 per week and continue each week thereafter pursuant to the terms of the Michigan

decree. The Respondent is further ordered to pay to the Petitioner the sum of $1,042.00 for the month she had physical custody of the children prior to this action within 30 days of the date of this Order; and it is FURTHER ORDERED that the Clerk of Court of Horry County is not to give the Petitioner's address to any party and that the local rule for the Petitioner's address to be placed on this order is waived; and it is FURTHER ORDERED that the Respondent is to notify the Clerk of Court of Horry County of any change of address within five (5) days of such change of address.

I certify that I verily believe this Final Order is in compliance with the requirements of Rule 27(c) of the Rules of Practice of the Family Courts. AND IT IS SO ORDERED.

DAVID N. WILBURN, PRESIDING JUDGE

OF THE FAMILY COURT OF THE FIFTEENTH

JUDICIAL CIRCUIT

Jan 10, 1986

Conway, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY

IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT FILE NO. 85-DR-26-1552

ORDER FILED JANUARY 8, 1986

Elizabeth J. Claypool,

Petitioner,

v.

Oliver Claypool, Jr.,
a.k.a. Bobby Rogers,

Respondent,

IN RE: Christine Claypool (a.k.a. Sandy Rogers), Robert Lee Claypool, (a.k.a. Bobby Rogers), and Oliver James Claypool (a.k.a. Jack Rogers)

This matter is before the court on a Bench Warrant which was served on the Respondent on December 11, 1985, pursuant to sections 14-21-70 and 14-21-870 of the Code of Laws of South Carolina, 1976. On December 11, 1985, Respondent's counsel advised the court that the amount ordered

to be paid for child support was more than the Respondent earned. The hearing was continued until December 17, 1985, so that Respondent's counsel could serve pleadings for a reduction in child support to be heard with the contempt hearing. The court directed the respondent to be held in jail until he paid $1,000.00 towards child support arreages of $2,340.00 as of this date.

HISTORY OF CASE

This matter was commenced by a Summons, Petition and Rule to Show Cause under the Uniform Child Custody Jurisdiction Act and the relief sought was: return of the three minor children, held by the Respondent for three and one half years under aliases; child custody; support; contempt; and all issues to be enforced under the Michigan Order. This court returned the children to the

Petitioner by Order dated August 18, 1985, and reserved child support to a later hearing in 30 days by which time the Respondent was directed to file a financial declaration. This court by Order dated October 28, 1985, granted Petitioner's motion to deny jurisdiction for Respondent's counterclaim for a modification of the Michigan Order as to custody, and granted enforcement of the Michigan support order as of the date of the South Carolina action. A review of the entire file indicates that the Respondent never raised an objection to enforcement of the child support order and despite an order of this court directing him to file a financial declaration within 30 days of August 18, 1985, the Respondent has refused to do so. The Respondent has raised as a defense that no order of child support

exists even though a certified Michigan Order has been filed with this court and served on him August 14, 1985, by the Horry County Sheriff's office. The court notes that the Respondent signed and consented to the Michigan Order. The court finds that the Order dated October 28, 1985, directing the Respondent to pay child support was personally served on the Respondent and that he did not appeal in a timely manner. The court finds that the time to request reconsideration has also expired and that Respondent may only petition for a modification of that Order based on a change of circumstances.

The court, after some discussion by counsel about competency, allowed the Respondent to address the court. The court finds that the Respondent, an attorney, is competent to understand the proceedings and the punishment if

convicted of contempt. The Respondent has raised constitutional issues and questions concerning his prior support order which merit further hearing. This court will grant respondent additional time to file pleadings and expects counsel for the Respondent to expeditiously file a Petition so that a hearing may be held in January, 1986, on a Friday. This court has the assurance of the Respondent that he will be able to immediately post $1,000.00 cash bond and over Petitioner's counsel's objection, the court will vacate that portion of the prior order of December 12, 1985, requiring payment of $1,000.00 child support to be released and set a $1,000.00 cash bond for release. In the event the Respondent does not appear for the continued hearing the $1,000.00 will be sent to the Petitionerr and an order for his arrest issued.

CONCLUSIONS OF LAW

The court has jurisdiction in this action and the power to make this order pursuant to sections 14-21-810, 820, 870, 890 of the South Carolina Code of Laws, 1976.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. This contempt hearing is continued until 9:30 a.m. on February 7, 1986.

2. Counsel for the Respondent is directed to file and serve expeditiously any petition for modification of the order justified by the facts and counsel for the Petitioner is directed to reply to the petition expeditiously so that this matter may be resolved at the continued hearing.

3. That the clause in the prior Order dated December 11, 1985, setting $1,000.00 child support payment for

release is vacated and replaced by $1,000.00 cash bond for release from jail.

4. The Respondent is directed to appear at the continued date and upon his failure to appear the $1,000.00 bond will be forfieted, sent to the Petitioner as child support, and an order for his arrrest issued by this court.

AND IT IS SO ORDERED.

I certify that I verily believe this Order is in compliance with the requirements of Rule 27(c) of the Rules of Practice of the Family Courts.

DAVID H. MARING,

PRESIDING JUDGE OF THE FAMILY COURT OF THE FIFTEENTH JUDICAL CIRCUIT

Dated: 1/8/86 Conway, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY

IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT FILE NO. 85-DR-26-1552

ORDER FILED DECEMBER 12, 1985.

Elizabeth J. Claypoool,

Petitioner,

v.

Oliver Claypool, Jr.,
a.k.a. Bobby Rogers,

Respondent.

IN RE: Christine Claypool (a.k.a. Sandy Rogers), Robert Lee Claypool, (a.k.a. Bobby Rogers), and Oliver James Claypool (a.k.a. Jack Rogers)

A Bench Warrant was issued for the arrest for the above named Respondent alleging that this Respondent is in arrears in payment of Child Support. The Respondent has been Ordered to pay Two Hundred Fourteen and 70/100ths ($214.70) Dollars per week. The Bench Warrant

alleged that the Petitioner is in arrears in the amount of Two Thousand Three Hundred Forty and No/100ths ($2,340.00) Dollars.

Upon arrest of the Respondent, J. M. Long, Jr., of this bar, appeared for the Respondent and Patricia M. Ferguson appeared for the Petitioner. It appears that the Respondent is filing a Petition to reduce the amount of child support payments on the grounds that he earns less than the amount he was ordered to pay.

After hearing the attorneys, I felt that the Respondent should be allowed to pay One Thousand and No/100ths ($1,000.00) Dollars on said arrearages, to be applied toward any arreage found due at the time of the hearing, upon the payment of said sum, to release the Respondent from custody until a hearing

can be held. THEREFORE, it is ORDERED that the Respondent remain in the custody of the Sheriff of Horry County until further Order of this court. AND IT IS FURTHER ORDERD that if Respondent pay the sum of One Thousand and No/100ths ($1,000.00) Dollars to the Clerk of Court for Horry County, to be applied to any arreages found due, he shall be released to again appear before this court at a hearing to be set. AND IT IS SO ORDERED.

I verily believe that the above Order complies with Rule 27(c) of the Rules of Practice for the Family Court.

DAVID H. MARING

Chief Judge - Family Court Fifteenth Judicial Circuit

Conway, South Carolina

December 11, 1985

signed 1:40 P.M.

A Bench Warrant was issued pursuant to

S. C. Code Section 14-21-70 and 14-21-870.

By Order of South Carolina Supreme Court all Family Court Judges are required to be present for a Judges' meeting Wednesday Afternoon and at a mandatory JCLE Thursday and Friday.

A hearing has been scheduled in this matter for Monday, December 16, 1985, at 9:00 A.M. Senator J. M. Long, Jr. represents the respondent.

STATE OF SOUTH CAROLINA COUNTY OF HORRY

IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT FILE NO. 85-DR-26-1552

ORDER FILED OCTOBER 28, 1985

Elizabeth J. Claypool,

Petitioner,

v.

Oliver Claypool, Jr.,
a.k.a. Bobby Rogers,

Respondent,

IN RE: Christine Claypool (a.k.a. Sandy Rogers), Robert Lee Claypool (a.k.a. Bobby Rogers), and Oliver James Claypool (a.k.a. Jack Rogers)

This matter came before me pursuant to Family Court Administrative Order, Contested Roster No. 46, wherein the above-captioned case was scheduled for a pre-trial hearing and Petitioner's Motion on said date. Present at the hearing were the Petitioner's attorney, Patricia

M. Ferguson, Esquire of Neighborhood Legal Assistance Program, Inc., Conway, South Carolina and the Respondent's attorney, G. Michael Smith, Myrtle Beach, South Carolina. The Petitioner's attorney submitted to this court a Motion and Notice of Motion regarding the issues of dismissing the Answer and Counterclaim of the Respondent, declining jurisdiction of the Counterclaim, and declaring the Respondent in default pursuant to Rule 7 of the Family Court Rules.

FINDINGS OF FACT

Based upon the pleadings, affidavits of the parties, and arguments of counsel, I make the following findings of fact. This action was commenced by the filing of a Temporary Restraining Order and Rule to Show Cause, Summons and Complaint on August 14, 1985. The action arose as a result of the Respondent moving his

children from the jurisdiction of the State of Michigan, changing the children's identities and relocating in Horry County, South Carolina. Through the efforts of law enforcement agencies in Horry County, the Petitioner was notified by said agencies that they had located the children of the parties in Horry County. Upon receiving notification, the Petitioner filed this action wherein she prays that this court enforce the Michigan Custody Decree which had originally granted her primary custody of the parties' minor children; punish the Respondent under the contempt powers of the court; detain the respondent for prosecution by the State of Michigan; award Petitioner all costs and expenses necessary for the enforcement of the Michigan Custody Decree; and temporary and permanent child support.

On August 16, 1985, the Petitioner together with her attorney and the Respondent together with his attorney appeared before the Honorable David H. Maring. At that hearing, Judge Maring Ordered enforcement of the Michigan Custody Decree and gave possession of the children to the Petitioner, relieved the Horry County Department of Social Services of temporary custody of said children and awarded the Petitioner temporary travel expenses in the amount of $300.00 to be paid by the Respondent pursuant to S.C. Code Ann. section 20-7-812 (1976), as amended. Judge Maring further ordered that further costs and the other issues raised in the Petitioner's Petition be determined at a final hearing on the merits of the matter. I concur with Judge Maring and find that all terms and conditions of the

Michigan Orders dated December 31, 1981 and April 1, 1982 relative to child custody and support are in full force and effect in Horry County, South Carolina.

On September 24, 1985, the Petitioner moved that this court hold Respondent in default pursuant to Rule 7 of the Family Court Rules. After argument of Respondent's counsel together with an Affidavit submitted by him on Respondent's behalf, I find that the Respondent is not in default and allowed the Respondent to answer.

The Petitioner further moved that this court dismiss the Answer and Counterclaim on the grounds that the Counterclaim failed to state facts sufficient to constitute a cause of action and that no specific change of circumstances were pled. Upon reviewing the Answer and Counterclaim of the

Respondent, I find that the allegations contained therein are sufficient to support the cause of action of the Respondent to modify the prior orders of the Michigan Courts.

The Petitioner also prayed for attorneys fees, additional costs, and detainment of the Respondent for prosecution by the State of Michigan. After reviewing the Financial Declarations of the parties and considering the argument of counsel on these ancillary matters and the fact that Petitioner's counsel is paid by federal funds, I find that the Petitioner is not entitled to attorney's fees and due to the fact that Petitioner submitted no evidence of other costs she is not entitled at this time to additional costs. I further find that this court does not have a factual basis for detaining the Respondent.

The final issue raised by the Petitioner involves the jurisdiction of this Court to hear the matters before it by virtue of the Respondent's Answer and Counterclaim. The Petitioner argued that this court should decline jurisdiction of the Counterclaim pursuant to S.C. Code Ann. sections 20-7-788, 20-7-796, 20-7-810 (1976) as amended. The Respondent argued that this court did in fact have jurisdiction pursuant to S.C. Code Ann. section 20-7-788(a)(1), (2), (4) and S.C. Code Ann. section 20-3-160 (1976) as amended. Based on the facts argued by counsel, together with the legal precedents set forth below, I find this court does not have jurisdiction to hear this matter.

In addition, this court will not allow a contemptous Respondent to litigate a modification of the Michigan

custody decree in the Courts of South Carolina.

CONCLUSIONS OF LAW

The critical legal issue in this matter is whether or not this court has jurisdiction to hear the Counterclaim raised in the Respondent's Answer. Both counsel skillfully presented their positions in this matter and the attorneys aggressively sought rulings in their favor. After hearing arguments of Petitioner's counsel, this court questioned the Respondent's attorney at length regarding his position on the jurisdiction issue. In support of the Respondent's position, the Respondent's attorney submitted a pre-trial brief.

The basis of the Respondent's arguments were that the Respondent removed his children from the jurisdiction of the Michigan Courts and

away from the presence of the Petitioner because he felt that it was in the childrens' (sic) best interest and welfare to do so. The Respondent argued that our legislature and our Supreme Court on numerous occasions stood for the premise that the welfare of the children and what is for their best interests is primary, paramount and controlling when the trial court is considering controversies between parents over custody of their minor children. See Powell vs. Powell, 256 S.C. 111, 181 S.E.2d 13 (1971) and S.C. Code Ann. section 20-3-160, as amended.

Relying upon the position that it would be in the children's best interest for them to relocate and remain with the Respondent, the Respondent's attorney also argued that a substantial change in circumstances had occurred which would

necessitate this court reviewing all the facts and circumstances which arose subsequent to the Michigan Decree which had initially awarded the parties their respective custody rights with the children. Further, Respondent's attorney argued that the doctrine of res judicata did not apply in this particular matter because of the fact that the change of circumstances arose subsequent to the executionn of the Michigan Orders. See Barrett vs. Barrett, 261 S.C. 11, 198 S.E.2d 532 (1973).

The statutory basis of the Respondent's argument that this court has jurisdiction is S.C. Code Ann. section 20-7-788 (1976), as amended, which states:

> (a) a Court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This State: (i) is the home state of the child at the time of the commencement of the proceeding ... and

(2) It is in the best interest of the child that a court of this state assume jurisdiction because: (i) the child and his parents, or the child and at least one contestant, has a significant connection with this state...

I conclude that this court does not have jurisdiction by virtue of S.C. Code Ann. section 20-7-798 (1976) as amended. Subsection B of the above referenced section states:

Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the Petitioner, without consent of the person entitled to custody has not properly removed the child from the physical custody or has improperly retained the child after a visit or other temporary relinguishment of physical custody.

In connection with the aforementioned section, I conclude that the Respondent (Petitioner on the Counterclaim) improperly removed the children from the jurisdiction of the State of Michigan and wrongfully detained the children and

wrongfully concealed the children's identities and whereabouts from their mother. As a result thereof, I conclude that the Court shall not exercise its jurisdiction to modify the prior custody decrees.

Based upon the findings of facts and discussion of law in this matter, I conclude that this court does not have jurisdiction to hear the evidence regarding a change of circumstances which would justify a modification of the Michigan decrees. Therefore, it is ORDERED that the Counterclaim of the Respondent seeking a modification of the Michigan Decrees is dismissed with prejudice; and it is FURTHER ORDERED that the Petitioner is not entitled to attorney's fees in this cause and the Petitioner is further not entitled to any additionnal suit costs or other travel

expenses at this time; and it is FURTHER ORDERED that the terms and conditions set forth in the Michigan decree filed December 31, 1982, Civil Action No. 81-217811 DM involving the issues of child support and child custody be made an Order of this court and the Respondent is hereby ordered to commence child support payments under said Order with payments to the Horry County Clerk of Court. The first payment shall be made within 10 days from the date of this Order, in the amount of $69.50 per child per week for a payment of $208.50 plus 3% court costs, for a total payment of $214.70 per week and continue each week thereafter pursuant to the terms of the Michigan decree. The Respondent is further ordered to pay to the Petitioner the sum of $1,042.00 for the month she had physical custody of the children prior to

this action within 30 days of the date of this Order; and it is FURTHER ORDERED that the Clerk of Court of Horry County is not to give the Petitioner's address to any party and that the local rule for the Petitioner's address to be placed on this order is waived; and it is FURTHER ORDERED that the Respondent is to notify the Clerk of Court of Horry County of any change of address within five (5) days of such change of address.

I certify that I verily believe this Final Order is in compliance with the requirements of Rule 27(c) of the Rules of Practice of the Family Courts. AND IT IS SO ORDERED.

DAVID N. WILBURN, PRESIDING JUDGE OF THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

Conway, South Carolina October 24, 1985

STATE OF SOUTH CAROLINA COUNTY OF HORRY

IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT FILE NO. 85-DR-26-1552

TMEPORARY RESTRAINING ORDER AND RULE TO SHOW CAUSE FILED AUGUST 14, 1985

Elizabeth J. Claypool,

Petitioner,

v.

Oliver Claypool, Jr.,
a.k.a. Bobby Rogers,

Respondent.

IN RE: Christine Claypool (a.k.a. Sandy Rogers), Robert Lee Claypool, (a.k.a. Bobby Rogers), and Oliver James Claypool (a.k.a. Jack Rogers)

TO THE RESPONDENT ABOVE NAMED:

A Petition is to be filed in this case on August 14, 1985, a copy of which is attached. It appears from this Petition that a Tempoary Restraining Order is necessary pending a hearing. It is,

therefore, ORDERED that the Respondent is restrained, prohibited, and forbidden from doing any of the following acts until a hearing can be held on the merits of this case. Respondent is restrained from physically abusing Petitioner, harrassing her, harming her, or interfering with her in anyway whatsoever. IT IS FURTHER ORDERED that the Sheriff of Horry County is to take immediate possession of the children: Christine Claypool (a.k.a. Sandy Rogers); Robert Lee Claypool (a.k.a. Bobby Rogers); and Oliver James Claypool (a.k.a. Jack Rogers); and turn the children over to the South Carolina Department of Social Services. IT IS FURTHER ORDERED that the Horry County Department of Social Services is granted immediate temporary custody of the said minor children pending a temporary

hearing in this manner. (sic) IT IS FURTHER ORDERED that the Horry County Department of Social Services is granted (sic) the children to this Court at the Horry County Courthouse on August 16, 1985, at 9:30 a.m. IT IS FURTHER ORDERED that the Respondent shall appear before me in the Family Court of the 15th Judicial Circuit on the 16th day of August, at 9:15 a.m., at which time he should be prepared to show any cause that he may have why the custody should not be enforced parties children should not be enforced (sic) and become permanent; and further the Respondent should be prepared at this time to show any cause why the Petitioner should not be granted any further relief requested in the Petition.

IT IS SO ORDERED this 14 day of August 1985, at Conway, South Carolina.

David H. Maring

Presiding Judge, Family Court of the Fifteenth Judicial Circuit

IT IS FURTHER ORDERED that if the respondent interferes with the execution of this Order, the Sheriff shall take the respondent into custody, place him in the County Jail, and bring him before the court when it is in session.

David H. Maring, Judge of
the Family Court

Conway, South Carolina

Dated August 14, 1985

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Elizabeth J. Claypool,

Plaintiff,

vs. Civil Action 81-217811-DM

Oliver Claypool, Jr.

Defendant.

ORDER AMENDING JUDGEMENT

At a session of said court, held in the Court House, in the City of Pontiac, County of Oakland, Michigan, on Apr 1, 1982. Present: Honorable Gene Schnelz

Circuit Judge

This matter having come on to be heard upon the Order to Show Cause, Substitute Service, Evidentiary Hearing and Issuance of Subpoenas and the court having heard the testimony of the parents of Oliver Claypool, Jr., the defendant herein, under oath in open court and it appearing

to this court that the defendant has violated the Judgement of Divorce by taking the children of the parties hereto without authority and contrary to the Judgement, that the whereabouts of himself and the children are unknown, and that it appears that he has quit his employment and may have moved from the jurisdiction of this court,

IT IS HEREBY ORDERED that the Judgement of Divorce shall be modified and amended to provide that the sole and complete custody, care, education and maintenance shall be awarded to the Plaintiff, Elizabeth J. Claypool.

IT IS FURTHER ORDERED that the Judgement of Divorce shall in all other respects be reaffirmed and not amended by this order, IT IS FURTHER ORDERED that Oliver Claypool, Jr., be and hereby is, found in contempt of the lawful orders

and judgements of this court. IT IS FURTHER ORDERED that the Friend of the Court conduct an immediate and thorough investigation to determine the wherabouts of the defendant and the minor children of the parties including utilization of all Federal and State resourses. IT IS FURTHER ORDERED that a bench warrant be and hereby is issued for the arrest, attachment and detention of Oliver Claypool, Jr.

/s/ Gene Schnelz

Circuit Court Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND FILED DEC 31, 1981

Elizabeth J. Claypool, Honorable

Plaintiff, Gene Schnelz

vs. Civil Action 81-217811 DM

Oliver Claypool, Jr.,

Defendant.

JUDGEMENT OF DIVORCE

At a session of said court held in the Courthouse Tower, City of Pontiac, in said County, on the 18th day of December 1981.

Present: Hon. Gene Schnelz

This cause having come on for trial on the 18th day of December, 1981, and continuing on to the 21st and 22nd of said month, the parties being present both in person and through counsel, and the proofs having been taken in open court from which it satisfactorily

appears to this court that the material facts alleged in the complaint are true, and that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no likelihood that the marriage can be preserved.

NOW THEREFORE: IT IS HEREBY ORDERED AND ADJUDGED that the marriage between Elizabeth J. Claypool, Plaintiff, and Oliver Claypool, Jr., Defendant, be and the same is hereby dissolved, and a divorce from the bands of matrimony is hereby ordered and adjudged.

ALIMONY

IT IS FURTHER ORDERED AND ADJUDGED that the question of alimony for both parties be in the same is hereby held in abeyance for the future adjudication of this court.

CUSTODY OF MINOR CHILDREN

IT IS FURTHER ORDERED AND ADJUDGED that the custody, care, maintenance and education of Robert Claypool, born, November 29, 1976, Christine Claypool, born January 12, 1978, and Oliver James Claypool, born December 13, 1980, minor children of the parties hereto, be and the same is hereby awarded jointly to both the Plaintiff and Defendant for a period of one (1) year or until the further order of this court.

The Plaintiff mother shall have physical custody and control of all three children from six o'clock P.M. on Sunday of each week through and until six o'clock P.M. on Friday and the Defendant father shall have physical custody and control of all three children from six o'clock P.M. on Friday until six o'clock P.M. on Sunday provided, however, that during eight (8) weeks during the-

summertime the Defendant father shall have physical custody and control for five (5) days each week and the Plaintiff mother for two (2) days, such two (2) days to be selected and depend upon her work schedule.

Each of the parties hereto may have a period of (2) weeks of exclusive time with the children for vacations during each year.

It is anticipated that the parties will be able to work out a reasonable schedule giving adequate and reasonable notice to each other within the framework set forth above.

CHILD SUPPORT

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant father, Oliver Claypool, Jr., shall pay to the Plaintiff Elizabeth J. Claypool, through the Office of the Friend of the Court the sum of Sixty-nine

Dollars and Fifty Cents ($69.50) per child per week as allowance for the support of the minor children of the parties until each child obtains the age of eighteen (18) years or until further order of this court.

IT IS FURTHER ORDERED that the child support requirement shall abate during the eights (8) weeks when the Defendant father shall have custody and the two (2) weeks when he shall have the vacation.

CHILD SUPPORT ARREARAGE

IT IS FURTHER ORDERED AND ADJUDGED that Oliver Claypool, Jr., Defendant, shall forthwith pay to the Office of the Friend of the Court any child support arrearage existing on the date of entry of this Judgement.

MEDICAL, DENTAL, OPTICAL, PSYCHOLOGICAL, AND HOSPITAL EXPENSES

IT IS FURTHER ORDERED AND ADJUDGED that Oliver Claypool, Jr., Defendant, shall pay the necessary medical, dental, optical, psychological, and hospital expenses of the minor children of the parties until each child attains the age of eighteen (18) years, or until further order of this court.

DOMCICILE AND RESIDENCE OF MINOR CHILDREN AND THE PARTIES

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, whose address is 20904 Indian, Southfield, Michigan, and the Defendant, whose address is 23827 Clarkson, Southfield, Michigan, shall notify the Office of the Friend of the Court of any change in their address.

IT IS FURTHER ORDERED AND ADJUDGED that the residence of the minor children be deemed to be that of the Plaintiff mother, and the domocile and residence of

said minor children shall not be removed from the State of Michigan without prior approval of this court.

MISCELLANEOUS PROVISIONS AS TO PROTECTION OF THE BEST INTERESTS OF THE MINOR CHILDREN

IT IS FURTHER ORDERED AND ADJUDGED that each of the parties hereto shall seek and maintain regular psychiatric or psychological counseling so long as this order for support and custody is operative, or until further order of this court.

IT IS FURTHER ORDERED AND ADJUDGED that no member of the opposite sex who is not a relative, may live in the home of either party for any time when the said party shall have physical custody and control of the minor children.

IT IS FURTHER ORDERED AND ADJUDGED that, notwithstanding anything contained here

into (sic) the contrary, the parties shall alternate visitation on the following holidays: Christmas Eve, Christmas, New Years, Easter, Memorial Day, Fourth of July, Labor Day, and Thanksgiving, commencing with the Defendant father enjoying Christmas Eve visitation from three o'clock to seven o'clock on December 24, 1981. The Plaintiff shall have visitation on Mother's Day and the Defendant shall have visitation on Father's Day.

PROPERTY SETTLEMENT

IT IS FURTHER ORDERED AND ADJUDGED that the property of the parties hereto be and the same is hereby divided in accordance with the division thereof made by said parties at the time of the separation, that being each of the said parties shall own that property which is presently in his or her possession except that a

certain joint savings account number 27-007737-3 with First Federal Savings and Loan Association of Detroit, being the proceeds from the sale of the marital home, which account shall be divided equally between them.

ATTORNEY FEES

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant, Oliver Claypool, Jr., shall pay to Cooper and Cohen, attorneys for the Plaintiff wife, the sum of Four Thousand ($4,000.00) Dollars as and for her attorney fees and that pursuant to G.C.R.726, there shall be a lien against the property awarded to the Defendant, Oliver Claypool, Jr., until those fees and the balance of Three Thousand Five Hundred ($3,500.00) Dollars which he owes to his attorney Henry S. Gornbein, are paid in full.

DOWER

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant, Oliver Claypool, Jr., shall pay to the Plaintiff, Elizabeth J. Claypool, the sum of One Dollar ($1.00) and that the provision made for the Plaintiff herein is in lieu of her dower in the land of her husband, the Defendant, and that he shall hereafter hold his remaining land free, and clear and discharged from any such dower right or claim and said provision shall be in full satisfaction of all claims that she may have in any property which the Defendant owns or may hereafter own or in which he has or may hereafter have any interest.

STATUTORY INSURANCE PROVISION

IT IS FURTHER ORDERED AND ADJUDGED that any rights of either party in any policy or contract of life, endowment or annuity insurance of the other as beneficiary are hereby extinguished.

MUTUAL RESTRAINING ORDER

IT IS FURTHER ORDERED AND ADJUDGED that the parties hereto are each enjoined and restrained from in any way threatening, annoying, striking, abusing, harming, interfering with or harassing the other or the property of the other upon penalty of contempt of court.

IT IS FURTHER ORDERED AND ADJUDGED that the Mutual Restraining Order of April 15, 1981 is hereby reaffirmed by this honorable court including the provisions contained therein that it is ordered that failure to comply with the Mutual Restraining Order will subject the offending party to the contempt power of this court, and if found guilty shall be imprisoned for not more than ninety (90) days and or fined not more than Five Hundred ($500.00) Dollars. The penalty portion of that restraining order as to

imprisonment and fine shall continue and be valid until one year from the date of this Judgement, unless extended by the further order of this court.

Even if not extended by this court, as to imprisonment, violation of the restraining order shall still subject the violator to the penalties of the full contempt powers of this court.

SERVICE FEE

IT IS FURTHER ORDERED AND ADJUDGED that Oliver Claypool, Jr., Defendant, shall pay to the Friend of the Court, 1200 N. Telegraph Road, Pontiac, Michigan, the sum of $1.50 per month, payable semi-annually in advance on January 2, and July 2nd hereafter while this order for support is operative. Initial payments for months preceding the next regular due date shall be made forthwith

John N. Obrien Circuit Judge

for Gene Schnelz, Circuit Judge

Approved as to Form and Content:

/s/ Stephen Cooper Elizabeth J. Claypool

Attorney for Plaintiff Plaintiff

Approved as to Form Only as to form only

/s/ Henry S. Gornbein Oliver Claypool Jr.

Attorney for Defendant (B. R. by consent)

IN THE SUPREME COURT OF

THE STATE OF SOUTH CAROLINA

Filed April 20, 1987

Oliver H. Claypool, Jr.,

and Oliver H. Claypool, Jr.,

as next friend of Oliver J.

Claypool, Christine O.

Claypool, and Robert L.

Claypool, Appellants,

v.

Elizabeth J. Claypool,

Appellee,

South Carolina Supreme Court Docket No.

86-697 (Memorandum Opinion No. 87-MO-175)

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that Oliver H.

Claypool, Jr., and Oliver H. Claypool,

Jr., as next friend of Oliver J.

Claypool, Christine O. Claypool, and

Robert L. Claypool, the appellants above-

named, hereby appeal to the Supreme Court of the United States from such part of the final judgement of the Supreme Court of the State of South Carolina, affirming the denial of the appellant father's motions for custody of his children made upon his and the appellant children's behalf; affirming the denial of the motions made upon the appellants' behalf to vacate, reconsider, and, or modify prior custody orders; affirming the denial of the motions to vacate the alleged order for appellant father's arrest; affirming the Family Court's "sentencing" of the father, for an alleged civil contempt of court, to forced labor in the South Carolina Department of Corrections; and affirming the Family Court's refusal to return the Appearance Bond posted upon the appellant father's behalf to insure his appearance

on February 7, 1986, entered in this action on April 6, 1987.

This appeal is taken pursuant to 28 U.S.C. 1257(2) and 28 U.S.C. 1257(1) with additional federal questions being presented pursuant to Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922); and jurisdiction being further sustained by Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); and Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 127 (1974).

/s/ Oliver H. Claypool, Jr., as next friend of Oliver J. Claypool, Christine O. Claypool, and Robert L. Claypool, Appellants,

/s/ Oliver H. Claypool, Jr.,
P. O. Box 15085
Quinby, SC 29501
(803) 669-6201

April 20, 1987 Appellant, pro per

IN THE SUPREME COURT OF

THE STATE OF SOUTH CAROLINA

Filed April 20, 1987

Oliver H. Claypool, Jr.,

and Oliver H. Claypool, Jr.,

as next friend of Oliver J.

Claypool, Christine O.

Claypool, and Robert L.

Claypool, Appellants,

v.

Elizabeth J. Claypool,

Appellee,

South Carolina Supreme Court Docket No.

86-697 (Memorandum Opinion No. 87-MO-175)

AFFIDAVIT OF MAILING OF:

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Oliver H. Claypool, Jr., being duly

sworn, deposes and says:

On April 20, 1987, I mailed a copy of

the appellants' Notice of Appeal to the

Supreme Court of the United States, in the above entitled case, certified first class postage prepaid, return receipt requested, to each of the following:

(1) Patricia M. Ferguson, Attorney at Law, Neighborhood Legal Assistance Program, P. O. Box 1819, Conway, SC 29526, counsel for appellee Elizabeth J. Claypool;

(2) Elizabeth J. Claypool, 936 S. 14th Street, New Castle, IN 47362;

(3) Billie G. Richardson, Clerk of Court, Family Court of the Fifteenth Judicial Circuit, P. O. Box 677, Conway, SC 29526; and,

(4) Attorney General for the State of South Carolina, Attn.: Asst. Attorney General B. J. Willoughby, P. O. Box 11549, Columbia, SC 29211.

I further certify that all parties required to be served have been served.

/s/ Oliver H. Claypool, Jr.

P. O. Box 15085

Quinby, SC 29501

(803) 669-6201

Sworn to before me this 20th day of April 1987. /s/ Paula C. Gibbs, Notary Public for the State of South Carolina, my commission expires 11/13/88.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

RECEIVED
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SUPREME COURT, U.S.

Oliver H. Claypool, Jr., and
Oliver H. Claypool, Jr. as next
friend of Oliver J. Claypool,
Christine O. Claypool, and
Robert L. Claypool,

Appellants.

No. 86-1840

vs.

Elizabeth J. Claypool,

Appellee

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

May it please the Court:

Appellee moves that the appeal herein taken be dismissed on the grounds that said appeal does not present a substantial federal question, the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on, and that the judgment rests on an adequate non-federal basis.

OPINION BELOW

This is an appeal from the unpublished, Memorandum Opinion of the South Carolina Supreme Court, summarily disposing of all but one of Appellant's sixty-one (61) exceptions to an Order of the Family Court for the Fifteenth Judicial Circuit of South Carolina. The sole exception discussed by the South Carolina Supreme Court resulted in the reversal, on factual grounds, of a contempt citation for refusal to pay child support issued against the Appellant. The child support issue has been remanded to the lower court for further action.

JURISDICTION

Appellant's Jurisdictional Statement misstates the record below in an attempt to develop proper jurisdiction in this Court.

Jurisdiction is primarily predicated on 28 U.S.C. §1257(1). As discussed below, most of the Appellant's points for review by this Court were not expressly passed on (in the unpublished Memorandum Opinion) by the South Carolina Supreme Court. That opinion, filed April 6, 1987 and appended to Appellant's Jurisdictional Statement (page 1a) can, under Rule 23 of the Rules of the Supreme Court of South Carolina (as amended), quoted in Appellant's Jurisdictional Statement (page 16), rest on one of four possible bases. Subsection (4) of that Rule could be used to sustain a judgment below on adequate non-federal grounds such as mootness, improper perfection of the issue on appeal below, or failure to properly raise the issue in the court of original jurisdiction. "Where highest court of the State delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, the United States Supreme Court will not take jurisdiction to review the judgment." Stembridge v. State of Georgia, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (Ga. 1952). Similarly, "When highest state court has failed to pass upon federal question, it will be assumed that omission was due to want of proper presentation in state court, unless aggrieved party in United States Supreme Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (N.Y. 1969). Appellee requests this Court to dismiss this appeal for failure of Appellant to establish the jurisdictional prerequisite.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent Constitutional and statutory provisions are set forth in the Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

This appeal is from the South Carolina Supreme Court which affirmed on all but one (1) decision of the Family Court of the Fifteenth Judicial Circuit of South Carolina (hereinafter Family

Court). The South Carolina Supreme Court reversed the contempt finding and remanded the child support issue to the Family Court for a determination.

Appellant (father) and Appellee (mother) were divorced by the Circuit Court of Oakland County, Michigan by order filed in that Court on December 31, 1981. Appellee was given weekday custody of the parties' three minor children. This decree was not appealed. Subsequent to this decree, Appellant, during a period of weekend custody, removed the children from Michigan, changed their names and his name and social security numbers and moved to South Carolina where he resided for three and one-half (3½) years. The Michigan Court amended the 12/31/81 Order by its Order dated April 1, 1982 which granted Appellee full custody, found Appellant in Contempt, and issued a Bench Warrant for Appellant's arrest.

Through a missing children's network the children were located and the Appellee filed an action in South Carolina to enforce the Michigan custody decree.

The children were returned to their mother in August of 1985 by Judge David H. Maring, Sr. (hereinafter Judge Maring) of the Family Court in a Temporary Order dated August 16, 1985 which was not appealed. Judge David N. Wilburn, Jr. (hereinafter Judge Wilburn) of the Family Court in a Final Order filed October 28, 1985 enforced the Michigan custody decree including the child support provision and declined jurisdiction of the South Carolina courts of Appellant's counterclaim to modify the custody decree. Appellant did not appeal either order. Appellant did not pay child support as ordered. Therefore, by administrative procedure the Horry County Clerk of Court requested a Rule to Show Cause for contempt to be issued. The Rule was returned unserved due to the fact that Appellant had not advised the Clerk's office of his proper address as required by the October, 1985 Order of the Family Court. When, at the Rule hearing on December 11, 1985

Judge Maring was advised by the Horry County Clerk of Court that the Rule could not be served, Judge Maring then issued a Bench Warrant. The Horry County Sheriff served the Bench Warrant on Appellant at his employment and allowed Appellant to travel independently to the Sheriff's office in the Horry County Courthouse. Upon arrival later that day the Appellant was immediately escorted to Judge Maring's courtroom. By the time Appellant arrived at Judge Maring's courtroom, the Court session for the day was over because Judge Maring was required to attend mandatory judicial training. Judge Maring rescheduled the case to the next court session and set a $1,000.00 payment to be applied toward the child support arrearages as a condition for Appellant's release. Appellant's attorney had requested the matter to be rescheduled so that Appellant could file pleadings in response to the contempt and to modify the prior support Order. The Appellant did not appeal this Order. At the next session (December 16, 1985) Judge Maring issued an Order which was filed January 8, 1986, which again continued the hearing at Appellant's request to file pleadings, and modified the terms of Appellant's release to allow the posting of a $1,000.00 cash bond for Appellant's release. This Order was not appealed. The pleadings filed by Appellant requested the Family Court to vacate, revoke, or reconsider the prior Order of October 28, 1985 to decrease child suport and to hold a custody hearing. The Family Court, after a hearing on February 7, 1986 by Order dated February 27, 1986 denied Appellant's motions and petition, applied his bond toward the child support arrearages, found him in contempt, and provided for a jail sentence in the event he did not purge himself by paying all of his child support arrearages and a fine. The February 27, 1986 Order was appealed to the South Carolina Supreme Court. The Order of the South Carolina Supreme Court is the basis of this United States Supreme Court appeal. Appellant did not follow the South Carolina statutory procedures to stay

his sentence pending appeal and served the sentence.

Appellant has filed numerous pleadings in other forums involving the same issues raised in this appeal, many of which are still pending. On December 17, 1985 Appellant filed a Writ of Habeas Corpus in the Federal District Court of South Carolina challenging his incarceration and an action under 42 USC §1983 based on both the Family Court proceedings and his incarceration. The Writ of Habeas Corpus was dismissed without prejudice on June 12, 1986 and has not been appealed. The Civil Rights Action is presently pending, although the Magistrate has recommended dismissal. Appellant has recently filed custody pleadings in Indiana and had filed custody reconsideration pleadings in Michigan in October 1986 (which may still be pending). In addition to these actions the Appellant is also involved in litigation in South Carolina Family Court pursuant to the remand by the South Carolina Supreme Court on the appeal below.

ARGUMENT

I

APPELLANT'S JURISDICTIONAL STATEMENT TO THIS COURT DOES NOT COMPLY WITH THE SUBSTANTIVE ELEMENTS OF RULE 15 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES AND, BECAUSE OF THIS NONCOMPLIANCE, THE APPELLANT'S APPEAL IS JURISDICTIONALLY DEFECTIVE.

Rule 15.1(g) of the Revised Rules of the Supreme Court of the United States (hereinafter Rules) require Appellant to present, in his jurisdictional statement, a "concise statement of the case containing the facts material to consideration of the questions presented." The Appellant's statement of the case materially misstates the history of this case below, including erroneous references to numerous final and unappealed decisions against Appellant's position.

II

THE QUESTIONS PRESENTED BY THE APPELLANT FOR REVIEW BY THIS COURT ARE NOT SUBSTANTIVE, WERE NOT PROPERLY RAISED BELOW, AND WERE NOT EXPRESSLY PASSED ON BELOW.

"This Court will decline jurisdiction over an appeal when

the Constitutional questions raised by that appeal are not substantive." Zucht v. King, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (Tex. 1922).

A motion to dismiss an appeal from a state court is proper in this Court on the ground that an appeal " does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis." Rule 16.1(b) of Revised Rules of the Supreme Court of the United States. If the court below issued no opinion or fails to pass upon a federal question, this Court will generally deny jurisdiction on the grounds that the judgment might have rested on a non-federal ground or the question presented was not properly raised below. Stembridge and Street supra page 2. The issues raised by the Appellant fail to satisfy the jurisdictional requirements of this Court as stated above in the following particulars:

A. Appellant's question (1) for review:

1. Application of sections 20-7-870 and 20-7-880 S.C. Code Ann. (1976 as amended) were subject to final disposition by Order of the Family Court dated December 11, 1985 and not the February 27, 1986 Order. That Order was not appealed. Those Code sections do not provide any legal or factual basis for the rulings in the Order of Judge Maring dated February 27, 1986 and was not properly raised in the lower court appeal to the South Carolina Supreme Court.
2. The issue is moot because the Supreme Court reversed the contempt finding on factual grounds.
3. The Bench Warrant is not contained in the Transcript of Record to the South Carolina

Supreme Court below and therefore could not have been considered by that Court.

4. The issuance of the Bench Warrant and arrest was not timely raised on appeal in the South Carolina courts but was raised in the pleadings for the first time in the Writ of Habeas Corpus which was dismissed and not appealed.

5. The Appellant was not incarcerated until after he appeared before the court with his attorney and the court set the condition for his release. (Order of the Family Court dated December 11, 1986, South Carolina Supreme Court Transcript at 58.)

B. Appellant's question (2) for review:

1. The Appellant served the sentence; issue is moot.

2. The sentence allowed the Appellant to purge himself so that the sentence was not forced labor.

3. The Appellant could have avoided the sentence by following the South Carolina statutory procedure.

4. No forced labor requirement is found in the statute.

Appellant failed to timely appeal and/or pursue his remedies in the South Carolina courts.

6. The question was not expressly passed on by any court.

C. Appellant's question (3) for review:

1. In this appeal the South Carolina Supreme Court never considered the validity of 28 United States Code (hereinafter USC)

1738(e).

2. No custody determination was made by a South Carolina court. Judge Wilburn (October 28, 1985 Order of the South Carolina Family Court) in a prior unappealed order merely enforced a Michigan decree dated April 1, 1982 which was also unappealed, and declined jurisdiction of the custody issue.
3. The issue was never expressly raised or passed on by the South Carolina Supreme Court.
4. The Court has no jurisdiction pursuant to 28 USC §1257. This issue does not fit a direct appeal as it was not addressed by the South Carolina Supreme Court.
5. There were adequate non-federal grounds for the South Carolina Supreme Court decision.

D. Appellant's question (4) for review:

1. Appellant's custody claim was not timely appealed or expressly passed on by the South Carolina Supreme Court.
2. No South Carolina court issued a custody order.
3. There was an adequate non-federal basis for the appeal.
4. There is no authority in USC 28 §1257 for the appeal.

E. Appellant's questions (5) and (6) for review:

1. The issue of sex discrimination was never raised or expressly passed on by the South Carolina Supreme Court.
2. The South Carolina Supreme Court did not expressly or by implication apply a sexual basis for its decision.
3. No custody determination was made by any

South Carolina court.

F. Appellant's question (7) for review:

1. The prior order refered to by Appellant as giving full faith and credit, dated October 28, 1985, was not timely appealed and was res judicata as was the Michigan decree.
2. The issue was not timely raised or expressly passed on by the South Carolina Supreme Court.
3. There is no basis for direct appeal pursuant to USC 28 §1257.

G. Appellant's question (8) for review:

1. There is no basis for review pursuant to USC 28 §1257.
2. It was not timely raised or expressly passed on by the South Carolina Supreme Court.
3. No South Carolina court made a determination that it was precluded from modifiying a Michigan decree by the Full Faith and Credit Clause of the United States Constitution.
4. Appellant made no timely appeal of the South Carolina Family Court Order which gave Full Faith and Credit to the Michigan decree.

H. Appellant's question (9) for review:

1. Appellant never raised the issue of vagueness of the South Carolina custody law in any court below.
2. The issue was not timely raised or expressly passed on by the South Carolina Supreme Court.

I. Appellant's question (10) for review:

1. The Appellant was given notice and an opportunity to be heard at a full and plenary hearing held on February 7, 1986 based on his pleadings and the contempt for failure to pay

child support.

2. The Family Court took testimony from Appellant on February 7, 1986 in which he indicated that he had removed all of his assets except his automobile and the bond money from the State of South Carolina. The hearing which was held after Appellant had been given an opportunity to voluntarily pay his child support obligations complied with giving Appellant his due process of rights.

As is clear from a review of Appellant's questions presented, Appellant has failed to comply with Rule 15.

CONCLUSION

The Appeal as presented to the Court in Appellant's Jurisdictional Statement is frivolous and without merit. Appellant has attempted to contrive Constitutional issues which do not exist under the facts history of the case and court order below. The Appeal should be dismissed.

Respectfully submitted

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Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1840

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OLIVER H. CLAYPOOL, JR., AND OLIVER H. CLAYPOOL, JR. AS NEXT FRIEND OF OLIVER J. CLAYPOOL, CHRISTINE O. CLAYPOOL, AND ROBERT L. CLAYPOOL, Appellants,

v.

ELIZABETH J. CLAYPOOL, Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Oliver H. Claypool, Jr.
P. O. Box 15085
Quinby, SC 29501
(803) 669-6201

June 30, 1987

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Note: The Transcript of Record on Appeal to the Supreme Court of South Carolina is designated herein as "TR"

No. 86-1840

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OLIVER H. CLAYPOOL, JR., AND OLIVER H. CLAYPOOL, JR. AS NEXT FRIEND OF OLIVER J. CLAYPOOL, CHRISTINE O. CLAYPOOL, AND ROBERT L. CLAYPOOL, Appellants,

v.

ELIZABETH J. CLAYPOOL, Appellee.

ON APPEAL FROM THE SUPREME COURT

OF SOUTH CAROLINA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

ARGUMENT

POINT I

THE JURISDICTIONAL STATEMENT CLEARLY ESTABLISHES THAT THIS COURT HAS JURISDICTION AND APPELLEE'S ATTACK THEREON IS AS LACKING IN MERIT AS IT IS LACKING IN SUPPORTING PARTICULARS.

Appellee's Motion to dismiss or affirm alleges at the bottom of page 1 that appellants' Jurisdictional Statement "misstates the record below in an attempt to develop proper jurisdiction in this Court." A similar allegation found at page 5 is apparently the entire substance of point 1 of appellee's argument and slightly reworded it forms the bulk of her Conclusion at page 10.

But careful search of appellee's Motion reveals that it fails to present any example of such claimed misstatement. In its entire length there is not a

single instance where it specifies or refers to any particular misstatement made in the Jurisdictional Statement.

In fact, such a search of appellee's Motion reveals only two things concerning misstatements. First, that it confirms appellants' statement found in their Jurisdictional Statement at p. 37-38 that in its Order of February 27, 1986, the family court misstated that the father "was served with a Rule to Show Cause under Family Court Rule 53..." for as appellee admits at the bottom of page 3, the father was not served as "(t)he Rule was returned unserved...." Second, that comparison of appellee's Motion with the Transcript of Record reveals, as detailed below, that it is appellee's Motion that contains misstatement after misstatement with many misleading statements as well.

Thus point I of the appellee's argument is totally without foundation. It is also totally without merit for the most searching and careful comparison of the Jurisdictional Statement and the TR reveals that the Jurisdictional Statement contains no misstatements but faithfully sets forth a concise statement of the facts material to consideration of the questions presented and it clearly establishes this Court's jurisdiction.

POINT II

APPELLEE'S MOTION SHOULD NOT BE RELIED UPON SINCE IN INSTANCE AFTER INSTANCE IT CONTAINS MISSTATEMENT AND/OR MISLEADING STATEMENTS.

For example, while the above quoted material from the bottom of page 3 of appellee's Motion, that "(t)he Rule was returned unserved...." is correct, the appellee goes on to incorrectly state

that such was "due to the fact that the Appellant (father) had not advised the Clerk's office of his proper address as required by the October, 1985, Order of the Family Court." This is misstatement and/or misleading for at least the following reasons: 1) there is nothing whatsoever in the record to substantiate it; 2) at all times since the beginning of this case in S. Carolina, the father has kept the family court, the clerk thereof, and appellee advised of his address; 3) if the clerk of court had any incorrect address it was supplied by appellee, who from the beginning has supplied the clerk with an address for the father that does not exist; 4) law enforcement officials knew where appellants lived for they had observed them there for some several days prior to the original ex parte order; 5) the father could easily have been served

at his regular place of employment where he was always found within minutes after issuance of the ex parte orders.

Appellee's motion goes on to misstate that the "Horry County Sheriff served the Bench Warrant on appellant at his employment..." while the undisputed and binding Statement of the Case below, correctly reveals that no warrant was served and although a deputy stated he had a warrant, when asked what it was for, he replied, "it was not like most warrants he had seen but that it was blank." TR 7, line 1-3.

Appellee continues: "Upon arrival later that day the appellant was immediately escorted to Judge Maring's courtroom. By the time appellant arrived at Judge Maring's courtroom, the court session was over because Judge Maring was required to attend mandatory judicial

training. Judge Maring rescheduled the case to the next court session and set a $1,000.00 payment to be applied toward the child support arrearages as a condition for appellant's release. Apellant's attorney had requested the matter to be rescheduled so that the Appellant could file pleadings in response to the contempt and to modify the prior support order."

But again appellee misstates the case, for when the father arrived at the Sheriff's office (which is in the courthouse) the morning session of court in which he was allegedly to appear was still in session. The undisputed and binding Statement in the TR states: "On arrival at the sheriff's office the father was taken into custody. The father requested a hearing before being incarcerated but said request was

denied." TR 7, L 9-11. The record also reveals the pleadings to which appellee refers were filed at 11:54 A.M. on December 11, 1985, TR 56 and the primary relief requested was "custody and control of the parties' minor children." TR 57. (If more detail is wanted, it is that after the father was in custody he was taken to the judge's office and when appellee's counsel later arrived the judge came off the bench and refusing to give a hearing stated the father should stay in jail until further order of the court or until he paid $1,0000.00 at which time he could be released for a hearing to be set. TR 7, 58-59, 359 L 18-25.)

Without citation to any authority, appellee states at the bottom of p. 4 through p. 5 of her Motion, "Appellant did not follow the South Carolina statutory procedures to stay his sentence

pending appeal and served the sentence." But that is incorrect, for the "contempt order had been automatically stayed for the filing of the Notice of Intent to Appeal" Phillips v. Phillips, 288 S.C. 185, 187, 341 S.E.2d 132 (1986). The father was kept in prison at forced labor even after the stay.

At page 5 appellee notes appellants also seek relief in Michigan and Indiana. But what appellee doesn't say is that while in this Court she urges that South Carolina does not have jurisdiction but that Michigan does, both appellee and her counsel Ferguson refuse to accept service of appellants' motions in the Michigan court; the Michigan Friend of the Court takes the position that its court does not have jurisdiction; and the Michigan court will not hold a hearing. In Indiana, appellee refused service,

slammed her door in the deputy sheriff's face, has yet to answer the petition served by mail, and asserts that jurisdiction does not lie in Indiana.

In appellee's Motion the phrase that appears most often is that such and such an order was "not appealed". But what appellee does not tell this Court is that the orders to which she refers were temporary, interlocutory or otherwise not disposing of the whole subject matter of the litigation and thus could not be appealed, Wheatly v. Wheatly, 339 S.E.2d 149 (SC App. 1985), and/or that they were entered without jurisdiction and hence void and without effect, or that they were invalid as obtained by the appellee by fraud or that they were no longer valid due to subsequent changes of circumstances which appellants clearly alleged and established. That the South

Carolina Supreme Court totally rejected appellee's res judicata claims is clear for it could not otherwise have reversed the family court to the extent that it did unless it found that claim to be completely without merit.

Specifically, concerning the constitutionality of sections 20-7-870 and 20-7-880 of the South Carolina Code, appellee suggests appeal was foreclosed by a failure to appeal the December 11, 1985 Bench Warrant Order since as appellee states "(t)hose code sections do not provide any legal or factual basis for the rulings in the Order ... of February 27, 1986." (True, as appellants' assert, they are constitutionally invalid.) But what appellee doesn't state is that sections 20-7-870 or 20-7-880 were never mentioned in any order prior to the February 27th Order which

for the first time indicated that the father was arrested pursuant thereto and that pursuant thereto his motions for vacation of the Bench Warrant, which had included as grounds therefore, the constitutional invalidity of such statutes, were denied. See, JS 30-42.

Appellee next asserts the issue is moot. Obviously, it is not. JS at 9 and 46-47. And that the alleged Bench Warrant is not in the TR is not the fault of the appellants. Did it even exist? It was never served upon any appellant. And appellee's statement that appellant was not incarcerated until after he appeared before the court is simply another of appellee's misstatements. TR 7 L9-14, TR 58-59, TR 359.

In connection with the constitutional invalidity of section 20-7-4000, appellee asserts the father served the sentence

and the question is moot. But the question is not moot for the father is faced with the same situation again. Appellee next asserts that the sentence allowed the father to purge himself and so it was not forced labor. But the South Carolina Supreme Court has already found that the father was unable to purge himself. (Apparently under appellee's theory, the death penalty could be assigned in civil contempt matters, for after all, if the deceased didn't want to die he could have purged himself. And the cruelty of appellee's theory, absurd on its face, really becomes apparent when one realizes that during this case a man was killed as a reult of being sentenced for civil contempt in South Carolina.) Appellee asserts that no forced labor requirement is found in the statute. But the only purpose of the statute is to

send people who have not committed crimes to the state minimum security prison where all prisoners are at forced labor. Appellee's assertion that appellants failed to timely appeal etc. is absurd. Obviously, appellants appealed and the South Carolina Supreme Court, albeit summarily, expressly denied the appellants' federal exceptions on appeal thereby upholding the validity of the statutes making appeal here proper pursuant to 28 U.S.C. 1257(2).

At the bottom of page 9 and top of page 10 appellee totally misstates the facts when she states appellants were given "an opportunity to be heard at a full and plenary hearing held on February 7, 1986, based on his pleadings and the contempt for failure to pay child support" for appellants' pleadings properly requested that custody of the

children be with their father but on February 7, 1986, the family court despite having agreed to hear such evidence, despite having acknowledged in its January 8, 1986 Order that the appellants had a federal constitutional right to be heard on said issue, despite the fact that over 20 witnesses (some from as far as Ohio and Michigan) appeared ready to testify for the children and the father, reversed itself, and refused to allow any evidence or testimony on the issue of the custody of the children. It also refused to allow any testimony or evidence concerning the invalidity of orders obtained by the mother's fraud upon the Michigan court. It also refused to allow any testimony or evidence in exculpation, extenuation or mitigation of the alleged contempt.

Appellee alleges at the top of page 10 that the father indicated in testimony on February 7, 1986, that "he had removed all of his assets except his automobile and the bond money from the state of South Carolina." Such a statement is both wrong and misleading for the father had not removed any of his assets, the bond money did not belong to him, and there was no such testimony.

POINT III

APPELLANTS' JURISDICTIONAL STATEMENT ESTABLISHES BEYOND A DOUBT THAT THIS CASE PRESENTS SUBSTANTIAL FEDERAL QUESTIONS.

Under Point II of appellee's argument, appellee misquotes Zucht v. King, 260 U.S. 174 (1922), but goes on to correctly state that this Court will not hear appeals that do not raise a substantial federal question. But beyond making that general statement, appellee

makes no argument that the questions in this case are not substantial federal questions such as are quite properly heard on appeal in this Court.

Appellee fails to suggest any case that would be controlling so as to make the federal questions presented here insubstantial. She asserts no challenge to the applicability and continued validity of case after case of this Court cited in appellants' Jurisdictional Statement at pages 49-63 showing that substantial federal questions are presented. Obviously, appellants have presented substantial federal questions and this Court should resolve them.

POINT IV

APPELLANTS' FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED BELOW AND THEY WERE EXPRESSLY PASSED UPON BY THE HIGHEST COURT OF THE STATE OF SOUTH CAROLINA.

Appellee quotes from Stembridge v. Georgia, 343 U.S. 541, 547 (1952), that "(w)here the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." But the instant case is just the opposite of Stembridge for here the highest court of South Carolina did deliver an opinion, and not only did they not rest their judgment upon non-federal grounds, it clearly appears that the judgment could not have rested upon a non-federal ground. Obviously, Stembridge has no applicability.

The only other case cited by the appellee is Street v. New York, 394 U.S. 576, 582 (1969) from which she quotes that when the "highest state court has failed to pass upon a federal question,

it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." But this too is clearly inapplicable, for in the instant case the South Carolina Supreme Court's opinion did reach and decide the appellants' federal questions. While admittedly, it did so summarily, its decision nevertheless clearly reveals that it specifically intended to reach all of the appellants' federal questions and that it denied them on their merits rather than due to any failure in their presentation or other procedural defect. Orr v. Orr, 440 U.S. 268 (1979) is satisfied. In any event, Street was heard in this Court because he did show that he had properly presented the federal questions in the state courts just as the Jurisdictional Statement reveals appellants have done.

More recent cases clearly reveal that this Court has jurisdiction. In Michigan v. Long, 463 U.S. 1032, (1983) the state court made reference to both state and federal law, this Court thoroughly explored this issue and definitively concluded: "Rather than dismissing the case, or requiring that the state court reconsider its decision on our behalf because of a mere possibility that an adequate and independent state ground supports the judgment, we find that we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground." 463 U.S. at 1044.

And in Caldwell v. Mississippi, 472 U.S. 320, 327, (1985) this Court stated: "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state

court must actually have relied on the procedural bar as an independent basis for its disposition of the case."

R. J. Reynolds Tobacco Co. v. Durham County, N.C., 55 LW 4034, 4037 (1986) came to the Court after the North Carolina Supreme Court summarily granted appellee's motion to dismiss for lack of a substantial federal constitutional question. This Court stated: "In the absence of positive assurance to the contrary from the North Carolina Supreme Court, we consider that court's dismissal of Reynold's appeal to be a decision on the merits."

CONCLUSION

For the above stated reasons, appellants pray that appellee's Motion to Dismiss or Affirm be denied and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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